He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-22–03 OF 2019(B) AND 02(f)-28–04 OF 2019(B)
TENGKU MAIMUN CHIEF JUSTICE, MOHD ZAWAWI, ABANG ISKANDAR, IDRUS HARUN AND ABDUL RAHMAN SEBLI FCJJ
25 JUNE 2020

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Land Law — Indefeasibility of title and interests — Good faith and valuable consideration — Registered owner of property charged same to bank for loan — Bank in good faith and for valuable consideration registered charge not knowing property owner had earlier sold property to third party who had fully paid purchase price but had not transferred title into his name — Whether on receiving full purchase price registered owner held property as bare trustee for third party purchaser and had no good title to pass to chargee-bank — Whether registered owner's title was defeasible under s 340(2) of National Land Code ('NLC') and liable to be set aside by third party buyer — Whether in circumstances bank despite being bona fide was 'immediate purchaser' having acquired interest in the property vide an insufficient or void instrument — Whether bank's registered charge was defeasible under s 340(2)(b) of NLC — Whether as immediate purchaser 'fides' of bank was irrelevant — Whether fact that bank's charge was registered could not give it priority over unregistered beneficial interest of rightful owner of the property

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The respondents in the two appeals herein were the administrators of the estate of a deceased person (the deceased') who had, during his lifetime, entered into a sale and purchase agreement ('the SPA') to buy a landed property ('the property') from He-Con Sdn Bhd ('He-Con'). At the time the SPA was signed, the document of title for the property had yet to be issued. Five years after the signing of the SPA, He-Con appointed the deceased as its attorney over the property under an irrevocable power of attorney ('P2') giving him absolute powers to deal with the property. P2 acknowledged that the deceased had paid the purchase price in full. It was signed by one of He-Con's directors pursuant to resolution ('D25') of the company's board of directors and witnessed by the lawyer ('SP1') who had prepared both the SPA and P2. Inter alia, P2 allowed the deceased to transfer the property into his name or that of his nominee and to sell, charge, rent, let or develop and manage the property without obtaining He-Con's prior consent. P2 also allowed the deceased to appoint a substitute attorney in his place. Two months before he died, the deceased appointed his wife (the first respondent) as his substitute attorney vide a power of attorney ('P3'). When the title to the property was issued, the developer registered it in

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A He-Con's name rather than in the name of the first respondent. The respondents subsequently discovered that He-Con had charged the property to Ambank (M) Bhd ('Ambank') as security to borrow funds and that following He-Con's default in repaying the loan, Ambank had obtained a court order to sell the property by way of public auction. The respondents applied to the High B Court to, inter alia, declare the deceased as the true owner of the property, set aside the transfer of the property from the developer to He-Con, and declare the charge and the order for sale as null and void on the ground of fraud. The respondents also sought to injunct Ambank from proceeding with the public auction. The High Court allowed the respondents' claim against He-Con, C declaring that the deceased was the beneficial owner of the property, but dismissed the claim against Ambank and held that the respondents were only entitled to the surplus remaining after the proceeds from the public auction of the property had settled the amount due to to Ambank. In coming to that conclusion, the High Court found that: (a) the documentary evidence, D especially P2, proved that the deceased had paid the full purchase price for the property to He-Con which, thereafter, held the property as a bare trustee for the deceased and had no right whatsoever to deal with the property including creating the charge in favour of Ambank; (b) Ambank was a bona fide party as it had no knowledge about the SPA or about exhibits P2, P3 and D25 and had E taken all reasonable steps to ensure that He-Con was the registered owner of the property free from encumbrances; (c) the respondents failed to prove that the charge was void and unenforceable; and (d) He-Con, which had been wound-up by order of court, did not adduce any evidence to challenge P2's validity and did not call any witness in support of its case except for the F liquidator who had no personal knowledge of the facts of the case. On hearing the appeals by He-Con and the respondents against the trial court's decision, the Court of Appeal ('COA') allowed the respondents' claims against both He-Con and Ambank. The COA held, inter alia, that: (i) the terms of P2 were clear and could not be varied by extraneous evidence; (ii) He-Con as a 'bare G trustee' of the property had no beneficial interest in it or authority to deal with the property in any way; and (iii) Ambank was an 'immediate purchaser' (and not a subsequent purchaser) and therefore its charge on the property was defeasible even if Ambank was a bona fide purchaser. The Federal Court granted He-Con and Ambank leave to file the instant appeals against the COA's H decision. He-Con's submissions at the hearing of the appeals were that: (1) the SPA was void under s 33(a) of the Contracts Act 1950 because a condition precedent for the obtaining of the State Authority's consent to the transaction had not been fulfilled; (2) the respondents failed to prove that the purchase price for the property had been paid in full; the mere statement in P2 that the I purchase price had been fully paid was insufficient; (3) P2 merely allowed the deceased to act on behalf of He-Con with respect to the property; P2 could not be construed to mean He-Con had divested itself of its rights and interests in the property; and (4) notwithstanding P2, He-Con had residual power to deal with the property including creating the charge in favour of Ambank. The

submissions made by Ambank were that: (A) as a bona fide purchaser it was entitled to the protection of indefeasibility under the proviso to s 340(3) of the National Land Code; (B) its registered charge should prevail over the unregistered interest of a purported beneficial owner (ie, the deceased); (C) all reasonable checks made by Ambank, including a search on the land register, did not reveal the deceased's interest in the land; and (D) Ambank had not been negligent because it only owed a duty of care to its customers and not to third parties including any beneficial owner whose interest the bank was unaware of.

Held, dismissing both appeals and affirming the decision of the COA:

(1) Based on the SPA, P2, P3, D25 and the unchallenged oral testimony of SP1, the respondents had established their case against He-Con on balance of probabilities. The aforesaid pieces of evidence clearly established that the deceased had paid the full purchase price for the property to He-Con to become the rightful owner of the property (see paras 23–36 & 78).

(2) P2 declared that the deceased had paid the purchase price in full and that it was in consideration of that fact that P2 was created to be irrevocable. P2 was an admission by He-Con that the purchase price had been fully paid. P2 was signed (as witnessed by SP1) by a director/manager of He-Con pursuant to a resolution (D25) passed by the company's board of directors. Both D25 and P2 bore the same date. As the respondents had established, through P2 and SP1, that He-Con's former director had signed P2, the onus was on He-Con to have rebutted the documentary evidence. But He-Con failed to do so, and the COA was right to uphold the trial court's invoking of adverse inference against He-Con under s 114(g) of the Evidence Act 1950 for failing to call relevant witnesses to rebut P2. The Courts below were also right in holding that s 91 of the Evidence Act 1950 would have precluded parole evidence from being adduced to vary or contradict the contents of P2 (see paras 26–29 & 41–44).

(3) P2 showed a clear intention on He-Con's part to divest itself of its interest in the property in favour of the deceased. Having received the full purchase price, He-Con became a bare trustee of the property for the deceased, and later for the first respondent as the deceased's substitute attorney, and it could not in law pass any interest in the property to Ambank by way of the creation of the charge which was void ab initio (see paras 52–53 & 75)

(4) It was never He-Con's pleaded case that the SPA was not a concluded contract because a pre-condition for obtaining the consent of the state authority had allegedly not been fulfilled. Parties were bound by their pleadings, or the lack of it, and could not lead evidence on facts or issues

A not pleaded. In any event, He-Con failed to establish that the SPA was not a concluded contract. In other words, P1 was a performed SPA (see paras 63, 65 & 77)

(5) The party seeking protection under the proviso to s 340(3) of the B National Land Code had to show that: (a) it was a subsequent purchaser of the property in dispute; and (b) it was a bona fide purchaser for value. Having received the full purchase price from the deceased, He-Con no longer had any interest in the property and as the bare trustee of the same for the deceased, could not pass any good title to Ambank. The C transaction between He-Con and Ambank was a direct and immediate purchase caught by s 340(2)(b) of the National Land Code although Ambank was not privy to the very act which rendered the instrument being void or insufficient. Ambank was therefore an 'immediate purchaser' when it registered its charge over the property and it could not D avail itself of the protection offered by the proviso in s 340(3) of the NLC. Ambank's fides was irrelevant. It might have been an innocent bona fide purchaser for value, but s 340(2) of the NLC did not excuse such a circumstance, however innocuous (see paras 81, 84, 87–88 & 90).

E (6) A registered title that was defeasible on account of vitiating acts committed by their perpetrators was liable to be set aside by the previous owner who had a good title (in this case, the deceased, who was the beneficial and rightful owner, albeit an equitable one) or by a bona fide subsequent purchaser for value of the property. The previous owner need F not be registered. What was required was that the previous owner had to have a good title. It did not matter whether it was legal or equitable in nature (see paras 86 & 95).

(7) There were no competing priorities between the respondents and Ambank. The respondents were the unregistered beneficial and rightful G owners of the property whereas Ambank had no legal interest in the property as it was caught by s 340(2) of the NLC because its immediate vendor was an incapacitated bare trustee. The charge transaction was null and void pursuant to s 340(2) of the NLC (see paras 103, 100 & 116).

H (8) In relation to the term 'immediate purchaser', the immediacy of the purchase related to the vitiating vendor and not how far removed the purchaser was in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property from a purchaser who was bona fide for value. Any direct dealing with a rogue I would vitiate the transaction rendering it defeasible, although it was duly registered (see para 101).

(9) Ambank's argument that it only owed a duty of care to its customers and not to any third parties such as the respondents could not be entertained because the pleaded case of both the respondents and Ambank never

raised the issue of negligence and breach of duty of care. As such, the court could not entertain issues which were not pleaded (see paras 107–108).

[Bahasa Malaysia summary

Responden-responden dalam kedua-dua rayuan ini adalah pentadbir harta pusaka si mati (si mati) yang telah, semasa hayatnya, membuat perjanjian jual beli ('SPA') untuk membeli hartanah ('hartanah') dari He-Con Sdn Bhd ('He-Con'). Semasa SPA ditandatangani, dokumen hak milik belum diisukan. Lima tahun selepas SPA ditandatangani, He-Con melantik si mati sebagai peguamnya ke atas harta itu di bawah surat kuasa yang tidak dapat ditarik balik ('P2') yang memberinya kuasa mutlak untuk menguruskan harta itu. P2 mengakui bahawa si mati telah membayar harga belian sepenuhnya. Ia ditandatangani oleh salah seorang pengarah He-Con berdasarkan resolusi ('D25') lembaga pengarah syarikat dan disaksikan oleh peguam ('SP1') yang telah menyediakan SPA dan P2. Antara lain, P2 membenarkan si mati untuk memindahkan hartanah ke atas namanya atau milik penamanya dan menjual, menggadai, menyewa atau mengembangkan dan mengurus hartanah itu tanpa mendapatkan persetujuan He-Con terlebih dahulu. P2 juga membenarkan si mati melantik peguam gantian bagitempatnya. Dua bulan sebelum dia meninggal dunia, si mati melantik isterinya (responden pertama) sebagai peguam gantinya untuk memberikan surat kuasa ('P3'). Semasa hak milik untuk hartanah dikeluarkan, pemaju mendaftarkannya ke atas nama He-Con dan bukan atas nama responden pertama. Responden-responden kemudian mendapati bahawa He-Con telah menggadai hartanah tersebut kepada Ambank (M) Bhd ('Ambank') sebagai jaminan untuk meminjam dana dan berikutan kegagalan pihak He-Con dalam membayar pinjaman tersebut, Ambank telah mendapatkan perintah mahkamah untuk menjual hartanah melalui lelongan awam. Responden-responden memohon kepada Mahkamah Tinggi untuk, antara lain, mengisytiharkan si mati sebagai pemilik sebenar hartanah, mengetepikan pemindahan harta itu dari pemaju ke He-Con, dan mengisytiharkan gadaian dan perintah penjualan sebagai terbatal atas dasar penipuan. Responden-responden juga berusaha untuk menghentikan Ambank daripada meneruskan lelongan awam. Mahkamah Tinggi membenarkan tuntutan responden-responden terhadap He-Con, dengan menyatakan bahawa si mati adalah pemilik hartanah, tetapi menolak tuntutan terhadap Ambank dan berpendapat bahawa responden-responden hanya berhak mendapat jumlah lebihan setelah hasil lelongan awam hartanah itu telah menjelaskan jumlah yang perlu dibayar kepada Ambank. Dalam membuat keputusan itu, Mahkamah Tinggi mendapati bahawa: (a) bukti dokumentari, terutama P2, membuktikan bahawa si mati telah membayar harga belian penuh untuk hartanah itu kepada He-Con yang, setelah itu, memegang harta itu sebagai pemegang amanah untuk si mati dan tidak mempunyai hak untuk menguruskan hartanah itu termasuk membuat gadaian memihak kepada Ambank; (b) Ambank adalah pihak bona fide kerana tidak

mempunyai pengetahuan mengenai SPA atau mengenai ekshibit P2, P3 dan D25 dan telah mengambil semua langkah yang munasabah untuk memastikan bahawa He-Con adalah pemilik hartanah yang didaftarkan bebas dari bebanan; (c) responden-responden gagal membuktikan bahawa pertuduhan itu tidak sah dan tidak dapat dilaksanakan; dan (d) He-Con, yang telah digulung dengan perintah mahkamah, tidak memberikan bukti untuk mencabar kesahihan P2 dan tidak memanggil saksi yang menyokong kesnya kecuali pelikuidasi yang tidak mempunyai pengetahuan peribadi mengenai fakta kes tersebut. Setelah mendengar rayuan oleh He-Con dan responden-responden terhadap keputusan mahkamah, Mahkamah Rayuan ('MR') membenarkan tuntutan responden-responden terhadap He-Con dan Ambank. MR berpendapat, antara lain, bahawa: (i) syarat-syarat P2 jelas dan tidak dapat diubah oleh bukti-bukti lain; (ii) He-Con sebagai 'pemegang amanah semata-mata' untuk hartanah itu tidak mempunyai kepentingan benefisial atau kuasa untuk berurusan dengan hartanah itu dengan cara apa pun; (iii) Ambank adalah 'pembeli segera' (dan bukan pembeli berikutnya) dan oleh itu gadaian ke atas hartanah itu tidak dapat dilaksanakan walaupun Ambank adalah pembeli bona fide. Mahkamah Persekutuan membenarkan He-Con dan Ambank untuk mengemukakan rayuan segera terhadap keputusan MR. He-Con berhujah semasa pendengaran rayuan bahawa: (1) SPA tidak sah di bawah s 33(a) Akta Kontrak 1950 kerana syarat yang mendahului untuk mendapatkan persetujuan Pihak Berkuasa Negeri terhadap transaksi tersebut belum dipenuhi; (2) responden-responden gagal membuktikan bahawa harga pembelian harta tanah telah dibayar sepenuhnya; kenyataan hanya di P2 bahawa harga pembelian telah dibayar sepenuhnya tidak mencukupi; (3) P2 hanya membenarkan si mati bertindak atas nama He-Con berkenaan dengan hartanah itu; P2 tidak dapat ditafsirkan sebagai bermaksud He-Con telah melepaskan hak dan kepentingannya dalam hartanah itu; and (4) walaupun terdapat P2, He-Con masih memiliki kuasa untuk menguruskan hartanah tersebut termasuk membuat gadaian yang memihak kepada Ambank. Hujahan yang dibuat oleh Ambank adalah bahawa: (A) sebagai pembeli bona fide, ia berhak mendapat perlindungan hak milik mutlak di bawah proviso s 340(3) Kanun Tanah Negara; (B) gadaian yang didaftarkan harus mengatasi kepentingan yang tidak didaftarkan pemilik benefisial yang dikatakan (iaitu si mati); (C) semua pemeriksaan yang wajar dilakukan oleh Ambank, termasuk pencarian di pendaftaran tanah, tidak mendedahkan kepentingan si mati ke atas hartanah tersebut; dan (D) Ambank tidak cuai kerana hanya mempunyai kewajipan berjaga-jaga (duty of care) terhadap pelanggannya dan bukan kepada pihak ketiga termasuk mana-mana pemilik benefisial yang kepentingannya tidak disedari oleh bank.

Diputuskan, menolak kedua-dua rayuan dan mengekalkan keputusan MR:

(1) Berdasarkan SPA, P2, P3, D25 dan keterangan lisan SP1 yang tidak dipertikaikan, responden-responden telah membuktikan kes mereka

terhadap He-Con berdasarkan imbangan kebarangkalian. Bukti-bukti yang dinyatakan di atas dengan jelas membuktikan bahawa si mati telah membayar harga belian penuh untuk hartanah itu kepada He-Con untuk menjadi pemilik hartanah yang sah (lihat perenggan 23–36 & 78). A

(2) P2 menyatakan bahawa si mati telah membayar harga pembelian sepenuhnya dan sebagai balasan P2 diciptakan untuk tidak dapat ditarikbalik. P2 adalah pengakuan oleh He-Con bahawa harga pembelian telah dibayar sepenuhnya. P2 ditandatangani (seperti yang disaksikan oleh SP1) oleh pengarah/pengurus He-Con berdasarkan ketetapan ('D25') yang diluluskan oleh lembaga pengarah syarikat. Kedua-dua D25 dan P2 mempunyai tarikh yang sama. Oleh kerana responden-responden telah membuktikan, melalui P2 dan SP1, bahawa bekas pengarah He-Con telah menandatangani P2, ia adalah menjadi tanggungjawab He-Con untuk membantah bukti dokumentari tersebut. Tetapi He-Con gagal untuk melakukannya, dan adalah tepat untuk MR mengekalkan keputusan mahkamah asal yang mengguna pakai andaian yang memudaratkan terhadap He-Con berdasarkan s 114(g) Akta Keterangan 1950 kerana gagal memanggil saksi yang relevan untuk membantah P2. Mahkamah sebelum ini juga adalah dengan tepat untuk berpendapat bahawa s 91 Akta Keterangan 1950 akan menghalang bukti parol daripada dilihat untuk mengubah atau bertentangan dengan isi P2 (lihat perenggan 26–29 & 41–44). B C D E

(3) P2 telah menunjukkan niat yang jelas dari pihak He-Con untuk melepaskan kepentingannya terhadap hartanah yang memihak kepada si mati. Setelah menerima harga belian penuh, He-Con menjadi pemegang amanah hartanah untuk si mati, dan kemudian untuk responden pertama sebagai peguam pengganti si mati, dan dari segi undang-undang, tidak boleh memberikan kepentingan dalam hartanah itu kepada Ambank dengan cara gadaian yang tidak sah dari awal (void ab initio) (lihat perenggan 52–53 & 75) F G

(4) He-Con tidak pernah memplidkan bahawa SPA bukanlah kontrak akhir/selesai kerana pra-syarat untuk mendapatkan kebenaran pihak berkuasa negeri yang didakwa tidak dipenuhi. Pihak-pihak adalah terikat dengan plid mereka, atau kekurangannya, dan tidak dapat mengemukakan bukti mengenai fakta atau isu yang tidak diplidkan. Walau bagaimanapun, He-Con gagal membuktikan bahawa SPA bukanlah kontrak akhir/selesai. Dengan kata lain, P1 adalah SPA yang diselesaikan (lihat perenggan 63, 65 & 77). H

(5) Pihak yang meminta perlindungan berdasarkan proviso s 340(3) Kanun Tanah Negara harus menunjukkan bahawa: (a) ia adalah pembeli selepasnya untuk hartanah yang diadili; dan (b) itu adalah pembeli bona fide bagi nilai. Setelah menerima harga pembelian penuh dari si mati, He-Con tidak lagi mempunyai kepentingan dalam hartanah itu dan I

sebagai pemegang amanah untuk si mati, tidak dapat memberikan kepentingan yang sah kepada Ambank. Transaksi antara He-Con dan Ambank adalah pembelian langsung di bawah s 340(2)(b) Kanun Tanah Negara walaupun Ambank tidak mengetahui tindakan yang menjadikan instrumen itu tidak sah atau tidak mencukupi. Oleh itu, Ambank adalah 'pembeli segera' ketika mendaftarkan gadaian ke atas hartanah itu dan ia tidak dapat memanfaatkan perlindungan yang dinyatakan dalam proviso s 340(3) KTN. Fahaman Ambank tidak relevan. Ia mungkin merupakan pembeli bona fide bagi nilai, tetapi s 340 (2) KTN tidak dapat digunakan untuk keadaan seperti itu, walaupun tidak memberi kesan (lihat perenggan 81, 84, 87–88 & 90).

(6) Hak milik yang didaftarkan adalah tidak mutlak kerana tindakan kesalahan yang dilakukan oleh pelaku yang dapat diketepikan oleh pemilik sebelumnya yang memiliki gelaran yang sah (dalam hal ini, si mati, yang merupakan pemilik benefisial dan yang berhak, dan yang sepatutnya) atau oleh pembeli seterusnya untuk nilai harta itu. Pemilik sebelumnya tidak perlu didaftarkan. Apa yang diperlukan ialah pemilik sebelumnya harus memiliki gelaran sah. Tidak kira sama ada ia adalah sah atau adil (lihat perenggan 86 & 95).

(7) Tidak ada keutamaan bersaing antara responden-responden dan Ambank. Responden-responden adalah pemilik hartanah benefisial yang tidak berdaftar dan yang sah sedangkan Ambank tidak mempunyai kepentingan undang-undang terhadap hartanah tersebut berdasarkan oleh s 340(2) KTN kerana penjual terdekatnya adalah pemegang amanah yang tidak mempunyai kuasa. Transaksi gadaian adalah batal dan tidak sah menurut s 340(2) KTN (lihat perenggan 103, 100 & 116).

(8) Sehubungan dengan istilah 'pembeli segera', pembelian segera adalah berkaitan dengan kesalahan penjual dan bukan perkiraan hubungan langsung di antara pembeli-pembeli dan penjual. Untuk menjadi pembeli berikutnya, ia mesti membeli kepentingan harta tanah daripada pembeli bona fida bagi nilai. Segala urusan langsung dengan melakukan kesalahan akan membatalkan transaksi dan menjadikannya tidak dapat dilaksanakan, walaupun sudah terdaftar (lihat perenggan 101).

(9) Hujah Ambank bahawa ia hanya mempunyai kewajipan berjaga-jaga (*duty of care*) terhadap pelanggannya dan tidak kepada pihak ketiga seperti responden-responden tidak dapat dilayan kerana kes diplidkan oleh kedua-dua responden dan Ambank tidak pernah membangkitkan isu kecuaian dan pelanggaran kewajipan berjaga-jaga (*duty of care*). Oleh yang demikian, mahkamah tidak dapat melayan isu yang tidak diplidkan (lihat perenggan 107–108).]

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Land Ordinance (Cap 68) s 88

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Lau Kee Sern (Lim Pey Tsyr with him) (Kee Sern, Siu & Huey) in Civil Appeal No 02(f)-22–03 of 2019 for the appellant.
Sri Cecil Abraham (Malcolm Fernandez, Syukran Syafiq and Muhd Hadwan with him) (C Sukumaran & Co) in Civil Appeal No 02(f)-28–04 of 2019 for the appellant.
Harjinder Singh Sandhu (Izzah Shakirah with him) (Akerdin & Co) in Civil Appeal Nos 02(f)-22–03 of 2019 and 02(f)-28–04 of 2019 for the respondents.

Abang Iskandar FCJ (delivering judgment of the court):

PRELIMINARY

This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as my learned brother, ldrus Harun FCJ has since relinquished the office of a judge under s 8C(1) of the Judges' Remuneration Act 1971. My learned sister Tengku Maimun bt Tuan Mat, CJ, my learned brothers Mohd Zawawi bin Salleh, FCJ and Abdul Rahman bin Sebli, FCJ have read this judgment in draft and all of them agreed that this judgment be the judgment of the court.

SALIENT FACTS OF THE CASE

[1] Bulyah bt Ishak and Noraini bt Abdullah ('the plaintiffs') are the joint administrators of the estate of Nor Zainir bin Rahmat ('the deceased') who passed away on 26 June 2002. The first plaintiff is also the widow of the deceased.

[2] He-Con Sdn Bhd ('the first defendant) is a company set up under the Companies Act 1965. The first defendant has been wound up on 10 December 2012. Teow Beng Hur ('second defendant') and Narrimah bt Abdullah ('the third defendant') are directors of the first defendant. Both are adjudged bankrupt. Ambank (M) Bhd ('the fourth defendant') is a licensed financial

institution which registered address is at Level 22, Bangunan Ambank Group, Jalan Raja Chulan 50200 Kuala Lumpur.

[3] Pursuant to a sale and purchase agreement dated 22 December 1997 ('the SPA'/P1), the deceased agreed to purchase three-storey shop-office with Mezzanine Floor provisionally known as Lot 31, Jalan J9/J, Section 9, Bandar Shah Alam Selangor Darul Ehsan under Title No HDS 151345, Lot No PT 917 Mukim Bandar Shah Alam, Daerah Petaling, Selangor ('the property') from the first defendant. The plaintiffs claimed that the deceased had paid the purchase price in full.

[4] By a power of attorney ('PA') dated 26 April 2002 which was registered in Kuala Lumpur High Court on 30 April 2002 under Presentation No 298003/02, the first defendant appointed and named the deceased as the attorney of the property ('the first PA'/P2).

[5] Pursuant to a PA dated 21 May 2002, registered in Kuala Lumpur High Court on 19 July 2002 vide Presentation No 18192/02, the deceased appointed the first plaintiff as the substitute attorney ('the second PA'/P3).

[6] The deceased died on 26 June 2002. The letters of administration was issued on 9 November 2005 vide Petition No 87–31–280 of 2004. Both plaintiffs were appointed as administrators of the estate of the deceased. At that time, the title of the said property was ready to be issued. The first plaintiff had requested that the title to be registered in her name. However, the developer refused to give its consent for direct transfer. The first plaintiff later found out that the stamp duties and assessment bills for the said property were in the sum of RM110,355.60. However, due to financial constraint, the first plaintiff postponed the idea to effect the transfer of the property to her name. But in the meantime, she had been paying quit rents and fees due to the property as well as collecting rentals due to the property, with no objections coming from the first defendant. Those are in line with the terms of the P2.

[7] The first plaintiff obtained the order from Kuala Lumpur High Court to administer the property vide vesting order dated 9 December 2008. Towards end of 2011, the first plaintiff discovered that the first defendant who was no longer the owner of the property, had charged the property to the fourth defendant. The name of the first defendant was sighted as being registered as the owner of the property. This was done without the first plaintiff's permission or consent. The first plaintiff then lodged two police reports. The first plaintiff had also lodged a private caveat over the property on 10 January 2012 vide Presentation No 1129/2012. However, the same was removed.

[8] Later, the fourth defendant sought for an order for sale of the property as

the first defendant had breached the terms and conditions of the financing facilities. The property was scheduled for auction on 8 April 2013. However, the plaintiffs had since filed this action, seeking the following:

a) Suatu Deklarasi bahawa Nor Zainir bin Rahmat (selepas ini dirujuk sebagai 'Simati') adalah merupakan Pemilik yang sah kepada hartanah Tiga Tingkat Setengah (3 1/2) Lot Kedai yang beralamat di No. 31, Jalan Tengku Ampuan Zabedah J9/J, Seksyen 9, 40100 Shah Alam, Selangor Darul Ehsan di bawah No. Hakmilik HSD 151345, Lot No P.T 917, Mukim Bandar Shah Alam, Daerah Petaling, Negeri Selangor (selepas ini disebut sebagai 'hartanah tersebut').

b) Suatu deklarasi bahawa pindahmilik Hartanah tersebut daripada Pemaju kepada ~~He Con Sdn Bhd ('dalam Penggulungan)~~ Defendan Pertama adalah tidak sah dan perlulah diketepikan dan/atau dibatalkan;

c) Suatu deklarasi bahawa selepas ~~kematian~~ Si Mati, ~~pemilik yang sah kepada Hartanah tersebut adalah Pusaka kepada Si Mati~~ mempunyai hakmilik yang tidak boleh disangkal dan kepentingan ke atas hartanah tersebut;

f) Suatu deklarasi bahawa Gadaian Perserahan No: 52709/2010, 52710/2010 dan 52711/2010 kesemuanya bertarikh 27/5/2010 keatas hartanah tersebut yang dilaksanakan oleh ~~He Con Sdn Bhd ('Dalam Penggulungan')~~ Defendan Pertama kepada ~~Defendan~~ Defendan Keempat adalah tidak sah ('null') dan terbatal ('void') tidak efektif dan tidak teratur atas alasan frod;

g) Satu perintah dan perakuan bahawa pindahmilik tanah tersebut oleh Defendan Pertama, Defendan Kedua dan Defendan Ketiga kepada Defendan Keempat diketepikan di bawah Seksyen 340(2) Kanun Tanah Negara:

e f. Suatu deklarasi bahawa Perintah Jualan yang dibuat oleh Defendan Keempat bertarikh 6/7/2012 berkenaan dengan Lelongan Hartanah tersebut adalah tidak sah dan terbatal;

~~f~~ g. Suatu injunksi untuk menyekat dan/atau melarang Defendan Keempat pekerjanya dan/atau ejen-ejennya daripada menguatkuasakan Perintah Jualan bertarikh 6.7.2012. Notis Permohonan bertarikh 24.10.2012 dan Perintah Notis Permohonan bertarikh 1.2.2013;

~~g~~ h. Suatu injunksi untuk menyekat dan/atau melarang Defendan Keempat untuk menjalankan Lelongan keatas hartanah Tiga Tingkat Setengah (3 1/2) Lot Kedai yang beralamat di No. 31, Jalan Tengku Ampuan Zabedah J9/J, Seksyen 9, 40100 Shah Alam, Selangor Darul Ehsan di bawah No. Hakmilik HSD 151345; Lot No P.T 917, Mukim Bandar Shah Alam, Daerah Petaling, Negeri;

~~h~~ i Suatu injunksi untuk menyekat dan/atau melarang Defendan Keempat untuk menguatkuasakan Gadaian yang dibuat oleh ~~He Con Sdn Bhd ('Dalam Penggulungan')~~ Defendan Pertama melalui Perserahan No 52709/2010, 52710/2010 dan 52711/2010 kesemuanya bertarikh 27/5/2010;

~~i~~ j Suatu perintah dengan ini diberikan supaya status quo hak-hak dan obligasi-obligasi Plaintif-Piaintif dan Defendan-Defendan tersebut dipelihara sementara menunggu pelupusan perbicaraan;

~~j~~ k. Selanjutnya dan/atau secara alternatifnya, ~~Hartanah tersebut dipindahmilik/didaftarkan terus~~ satu perintah dan deklarasi bahawa Defendan Keempat dengan serta-merta melaksanakan suatu Memorandum Pindah Milik bagi hartanah tersebut keatas nama Plaintif Pertama dan Plaintif Kedua di atas kapasiti/kedudukan mereka sebagai Pentadbir-Pentadbir Harta Pusaka Simati;

l) Dalam keadaan Defendan Keempat gagal, enggan dan/atau cuai untuk memindah milik tanah tersebut kepada Plaintif, maka selepas itu suatu perintah dan deklarasi diberikan kepada Penolong Kanan Pendaftar/Timbalan Pendaftar Mahkamah Tinggi Shah Alam untuk melaksanakan pindah milik tersebut bagi pihak Defendan berpihak kepada Plaintif-Plaintif;

~~k)~~ m Gantirugi am yang ditaksirkan oleh Mahkamah Yang Mulia ini;

n) Faedah keatas gantirugi am dan dari tarikh pemfailan Writ Saman sehingga tarikh penyelesaian penuh;

~~l)~~ o. Kos; dan

~~m)~~ p Lain-lain relif yang difikirkan sesuai oleh Mahkamah Yang Mulia ini.

FINDINGS OF HIGH COURT

[9] On 30 June 2015, the plaintiffs' solicitor indicated that the claim against the second and third defendants was withdrawn as they had been adjudged bankrupt. Thus, the action was proceeded against the first and fourth defendant only.

[10] Upon hearing the parties, the High Court allowed the plaintiffs' claim as follows:

a) Suatu Deklarasi bahawa Nor Zainir Bin Rahmat (selepas ini dirujuk sebagai 'Si mati' adalah merupakan pemilik benefisial kepada hartanah Tiga Tingkat Setengah (3 1/2) Lot Kedai yang beralamat di No. 31. Jalan Tengku Ampuan Zabedah J9/J, Seksyen 9, 40100 Shah Alam, Selangor Darul Ehsan di bawah No. Hakmilk HSD 151345, Lot No. P.T 917, Mukim Bandar Shah Alam, Daerah Petaling, Negeri Selangor (selepas ini disebut sebagai 'hartanah tersebut');

dan

b) Kos sebanyak Ringgit Malaysia Lima Belas Ribu (RM15,000.00) sahaja dibayar oleh Defendan Pertama kepada Plaintif-Piaintif.

(2) bahawa tuntutan-tuntutan Plaintif terhadap Defendan Keempat ditolak dengan kos sebanyak Ringgit Malaysia Lima Belas Ribu (RM 15,000.00) sahaja.

(3) bahawa Plaintif-Piaintif berhak kepada sebarang bayaran lebihan yang mungkin ada daripada hasil jualan lelongan Hartanah tersebut selepas hutang Defendan Keempat diselesaikan.

[11] In finding so, the learned High Court judge found, inter alia, that:

A (a) the deceased is the owner of the property as the deceased had purchased the property and paid the full purchase price to the first defendant. The plaintiffs evidence was supported by documentary evidence in exh P2 which confirmed that the full purchase price had been paid;

B (b) exh P2 was signed by the manager of the first defendant and witnessed by the plaintiffs' witness, Bhadarul Baharain bin Sulaiman ('SP1'), an advocate and solicitor. Exhibit P2 was duly stamped in accordance with the applicable law. The first, second and third defendants had never disputed the signing of the document or claim that the same is false;

C (c) the burden is on the first defendant to secure the attendance of the second and third defendants as witnesses in court to prove their case;

(d) the first defendant had not taken steps to challenge the authenticity of the document by sending the same to the handwriting expert for verification. D The learned judge had invoked adverse inference under s 114 illustration (g) of the Evidence Act 1950 ('the EA 1950') against the first defendant;

(e) the first defendant could not prove its allegation that the deceased did not have the means to pay that huge sum of money to the first defendant. The E first defendant could not counter the overwhelming evidence offered by the plaintiffs in the form of the SPA as well as the first and second PA;

(f) the fact that the first defendant is the immediate owner of the property was not disputed. However, the title is defeasible under the circumstances provided under s 430(2) of the National Land Code ('the NLC'). F Reliance was placed on the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 897 ('*Kamarulzaman*'s case');

(g) the first defendant knew from the outset that the purchase price had been paid in full to the first defendant. As such, the first defendant was holding G the property as a bare trustee for the deceased and had no right to deal with the property. Case *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20 was referred to;

(h) as the first PA was an irrevocable PA and for valuable consideration, all H rights and interest in the property had been transferred to the deceased and subsequently by virtue of the second PA, the rights and obligations had been transferred by the deceased to the first plaintiff;

(i) the first defendant failed to produce evidence to show that the I administrators of the estate of the deceased had given permission and/or mandate to the first defendant to charge the property as a security for financial facilities granted to it by the fourth defendant;

(j) the property belongs to the deceased and the first defendant was merely holding it as a bare trustee for the deceased. Therefore, the first, second

and third defendants had no power to charge the property to the fourth defendant as a security for the financing facilities the first defendant took from the fourth defendant;

(k) the fourth defendant was a bona fide party. There was no evidence to prove that the fourth defendant was negligent. It was disclosed during the trial that the first, second and third defendants had intentionally suppressed the information pertaining to exhs P1, P2 and the first defendant Director's Circular Resolution (D25) from the fourth defendant;

(l) the fourth defendant had taken all reasonable measures to verify the status of the property before the loan was approved. The search conducted proved that the first defendant was the owner of the property and the property was free from all encumbrances. The plaintiffs failed to prove that the charge was void and unenforceable; and

(m) the fact that the first defendant had breached the terms of the financing facilities was not disputed. The fourth defendant has the right to proceed with the said auction, any amount remaining from the sale shall be paid to the plaintiffs.

AT THE COURT OF APPEAL

[12] Dissatisfied with the decision of the High Court, the plaintiffs vide Civil Appeal B-02(NCVC)(W)-638–04 of 2016 ('Appeal 683') filed an appeal against the fourth defendant to the Court of Appeal ('COA').

[13] On the other hand, the first defendant had also filed an appeal vide Civil Appeal No B-02(NCVC)(W)-803–04 of 2016 ('Appeal 803') against the plaintiffs. At the end of the hearing, the COA unanimously affirmed the learned judge's decision which allowed the plaintiffs' claim against the first defendant with costs of RM15,000. In respect of the plaintiffs' appeal against the decision of the learned judge which dismissed the plaintiffs' claim against the fourth defendant, the COA allowed the plaintiffs' appeal with no order as to costs. Accordingly, the order of the learned judge in this respect was set aside.

[14] In deciding so, the COA made the following findings:

In respect of Appeal 803:

(a) the COA made observation that the terms of exh P2 are clear. Therefore, no evidence shall be given in proof of the terms of exh P2 except the document itself. When the terms of agreement have been reduced to writing parties are bound by the terms of the agreement and the agreement could only be proved by the agreement itself.

(b) the COA is of the view that the learned judge had rightly invoked the provision of s 114 illustration (g) of EA 1950 against the first defendant for non-calling of the second and third defendants in court as these defendants had personal knowledge of the matter and would be in a better position to provide the best evidence for the first defendant. The burden lies on the first defendant to call the second and third defendants to testify on its behalf. The finding is in line with the provision of s 103 of EA 1950. The COA found no appealable error on the part of the learned judge that merit curial intervention.

In respect of Appeal No 638

(a) the COA is satisfied that the fourth defendant is an immediate holder of the charge;

(b) the High Court's decision to dismiss the plaintiffs' claim and allowed the fourth defendant to proceed with the order for sale of the property went against the principle enunciated in *Kamarulzaman* case and followed by *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 ('*Samuel Naik*'s case'). A vendor who is a 'bare trustee' has no beneficial interest in the property. Therefore, the said vendor is not authorized by law to sell, transfer or deal with the property to the new purchaser or holder of his interest in the land;

(c) there is sufficient evidence before the court that the first plaintiff had taken possession of the property and had been paying quit rents and assessment bills to the proper authorities. This is line with the terms of exh P2; and

(d) the COA found the learned trial judge had erred and misdirected his mind as to the law and fact, when His Lordship ruled that the fourth defendant was a bona fide party and was not negligent in causing the charge over the property to be registered in its favour.

APPEALS TO THE FEDERAL COURT

[15] The above decisions of the COA had led these two appeals to this court, ie Civil Appeal 02(f)-22–03 of 2019(B) ('Appeal No 22') by the first defendant and Civil Appeal No 02(f)-28–04 of 2019(B) ('Appeal No 28') by the fourth defendant. The leave to appeal was granted to both the first and the fourth defendants on 5 March 2019.

[16] For Appeal No 22, the questions of law allowed are as follows:

(a) whether in a transaction involving landed property without title, the concept of bare trustee and/or beneficial ownership can arise where the conditions precedent of an agreement made between the parties have yet

to be fulfilled and the underlying transaction has yet to be performed to completion according to the agreed terms thereof? A

(b) whether a statement contained in a sale and purchase agreement and/or a power of attorney stating that a certain purchase price has been paid can be accepted as final and conclusive proof of such payment where no positive evidence is adduced in support thereof? and B

(c) whether a donor of a power of attorney executed in relation to a landed property is subsequently prevented from dealing with the said property, including creating a legal charge under the provisions of the National Land Code? C

[17] Whereas for Appeal No 28, the appeal by the fourth defendant bank, the three questions of law (out of the five questions of law posed) allowed by the leave panel are as follows: D

(A) does a licensed bank owed a duty of care to the beneficial owner of land:

(i) whose title is not reflected anywhere on the register of title;

(ii) whose (unregistered) interest is nowhere reflected on the register of title; E

(iii) who is unknown to the licensed bank?

(a) in other words, in the tort of negligence, can a duty of care be owed to an unknown or unnamed party?

(iv) where a court of first instance finds, as a fact, that the licensed bank has taken all reasonable and necessary steps under the law to ascertain if anyone else has any title or interest over the land; and F

(v) where the court finds that the licensed bank has acted bona fide;

(B) in such circumstances, is the interest of the licensed bank defeasible under s 340 of the National Land Code: G

(i) because the registered owner was a 'bare trustee' and this fact was not known (nor capable of being discovered by the licensed bank) and nowhere reflected anywhere on the register of title; H

(ii) because the registered owner (qua bare trustee) had no right to charge the land to the said licensed bank (and this fact was not known nor capable of being independently ascertained by the licensed bank);

(iii) because what is said to have been done by the registered owner was done without the licensed bank's knowledge that the registered owner was not permitted to do so; and I

(iv) in an instance where the licensed bank has, at all material times, acted bona fide and no fraud was proven or found;

(C) is the licensed bank (being the holder of a subsequent interest in the land) protected by the proviso to s 340(3) of the National Land Code in light of the following decisions of the Federal Court which diverge:

(a) *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] MLJU 134; [2019] 3 CLJ 441;

(b) *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711;

(c) *CIMB Bank Bhd v Am Bank (M) Bhd & Ors* [2017] 5 MLJ 142;

(d) *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; and

(e) *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 897.

[18] We heard this appeal on 8 October 2019. However, we needed some time to consider all the submissions and the records of appeal. We had also indicated to parties that we will inform them of our decisions once we are ready to do so. These are now our decisions on these two appeals and our reasons for having so decided.

[19] Before us, the first defendant's complaints have been as follows:

(a) the plaintiffs had failed to adduce among others, the proof of payment of the purchase price of RM2,133,631. The purported sale of the land vide the purported SPA was conditional upon the procurement of an unconditional approval and consent from the developer and/or the proprietor. Such approval and consent were never obtained. Hence, the purported SPA is void under s 33(a) of the Contracts Act 1950;

(b) Mr Tee Siew Kai, the liquidator ('DW1') testified based on the records of the company that there was no evidence that the company had received any money in respect of the purported purchase of the land by the deceased. A mere statement contained in purported PA stating that such purchase price had been paid should not have been accepted by the High Court and the COA as a conclusive proof of such payment. Leave question (b) shall therefore be answered in favour of the first defendant; and

(c) the High Court and the COA have failed to appreciate the true nature and purport of the purported PA. The purported PA has merely conferred an authority and power on the deceased to act on behalf of the company. It is incorrect for both the High Court and the COA to hold that the company has vide the purported PA divested itself of its rights and interest in the land. Despite the purported PA, the company was

and is still entitled to deal with the land including, inter alia, creating a legal charge under the provisions of the NLC in favour of the bank. Hence, leave question (c) shall be answered in favour of the first defendant.

[20] On the part of the fourth defendant, it had addressed the court orally that only three questions were allowed by the leave panel, out of the five questions that were posed before it.

[21] In respect of questions B and C, it was the complaint of the fourth defendant that:

(a) the COA erred when it held that the fourth defendant's registered interest in the land was defeated by an unregistered interest;

(b) the COA in its grounds of judgment fell into further error in its reliance on the decisions of *Kamarulzaman*'s case and *Samuel Naik*'s case. These two decisions involve entirely innocent parties who were either on the register correctly and were defrauded for no fault of their own or were not on the register and were defrauded not for want of anything that they might have done to protect their interests (ie Samuel Naik). On the factual scenario before us: Even assuming that the deceased is beneficial owner, he was obliged, at law, and under both PAs (assuming the second PA is valid) to either transfer the title to the deceased's name or to such other third party's name. There is acceptable reason why this obligation at law was not complied with. This relevant and distinguishing factor brings this case outside the ambit of *Kamarulzaman* and *Samuel Naik*'s case;

(c) in the present case, the competing interests lie between the fourth defendant's registered charge (one who is undisputedly a bona fide purchaser for value) and a beneficial owner's unregistered interest. In the circumstances, the fourth defendant should be accorded protection under the proviso to s 340(3) of the NLC;

(d) a distinguishing point to note in *Kamarulzaman*'s case is that the registered proprietor's interest was clearly reflected on the register. However, in the immediate case, the evidence shows that the beneficial owner consciously and deliberately chose to ensure that the register did not reflect his alleged beneficial interest. Any third party (ie the fourth defendant) when dealing with the property (bona fide and in good faith) would not be apprised of the beneficial interest(s) claimed on the title, therefore; a beneficial owner, in a situation such as this, must therefore take the consequences of his decision not to register his interest over the land (what more when the first PA expressly provides that he is obliged, as donee, to register his ownership of the land in his name or in the name

of such other third parties). By leaving his interest off the register — this was the plaintiffs inviting misfortune;

(e) the COA's reliance on *Samuel Naik*'s case is misconceived because it was a case where Public Bank could not have been faulted. Its interest in the deed of assignment was not registrable — especially since title had not been issued. This is not the facts on our case. Our facts concern a purported beneficial owner who consciously and deliberately chose to remain off the Register in defiance of the NLC and the positive obligations undertaken by him in the past;

(f) further, *Samuel Naik*'s case does not stand as a proposition that a bank, being a holder of a subsequent interest in the land, is not entitled to the protection of the proviso to s 340(3) of the NLC. Such a proposition flies in the face of the decision of *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] MLJU 134; [2019] 3 CLJ 441 ('*Pushpaleela*'s case') and the clear wordings of s 340 of the NLC;

(g) in sum, it is clear that the GOA has misconstrued the law in relation to s 340 of the NLC. Therefore, the Federal Court's decision in *Pushpaleela*'s case must prevail in these factual circumstances. Thus, the fourth defendant, who is a bona fide purchaser of the land, is protected by the proviso to s 340(3) of the NLC;

(h) in distinguishing *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711 ('*T Sivam*'s case'), the fourth defendant could not have discovered the beneficial owner's interest despite having made all the necessary checks. At no point in time did the fourth defendant has knowledge that the first defendant wrongly remained on the register (if it is held that the deceased was beneficial owner, which is not acknowledged). The fourth defendant had acted bona fide at all material times;

(i) as such, the fourth defendant should rightfully be protected by the proviso to s 340(3) of the NLC; and

(j) the leave question (B) ought to be answered in the negative as the fourth defendant's interest is indefeasible. As the fourth defendant's should be protected by the proviso to s 340(3) of the NLC, the leave question (C) therefore should be answered in the affirmative.

[22] In respect of question A, it was the complaint of the fourth defendant that:

(a) the COA, without a careful consideration of the facts of the case and why the law would (or should), extend the concept of a duty of care to

the present circumstances, in para [46] of the grounds of judgment, simply held that in addition to the fourth defendant not being 'bona fide', the fourth defendant was also negligent;

(b) it is the fourth defendant's complaint that this finding of the COA, apart from going against principle and precedent, lays down a generic and general duty of care which is not discussed or circumscribed (ie limited) by the COA. It means that all banks, in Malaysia, can be held liable for negligence for registering a charge in circumstances where it is not pleaded, evidenced or even alleged that the bank could, with reasonable diligence, have discovered the unregistered beneficial interest claimed on the land;

(c) a bank's duty of care is, generally, only owed to its customers. Invariably, such a relationship is also governed by contract. Accordingly, this duty of care is premised concurrently on contract and tort unless the contract expressly excludes liability in tort;

(d) based on the case of *Jaafar bin Mohd Khalid v Hong Leong Bank Bhd* [2013] 5 MLJ 800, the fourth defendant submitted that a bank does not generally owe a stranger a duty of care where there is no sufficient proximity or foreseeability of damage;

(e) the ambit of duty of care does not extend to third parties such as beneficial owners of land in the present factual matrix as guided by *Pushpaleela*'s case;

(f) the fourth defendant bank does not, on the present law and precedent, owe a duty of care to the plaintiffs. It stands to logic, common sense and precedent that the fourth defendant could not guard or secure the interests of a third party: (i) of whom the fourth defendant was unaware existed; (ii) whose interests in the land the fourth defendant was entirely unaware of (this was not alleged at trial); (iii) whose interests in the land the fourth defendant is not alleged to have been identifiable by a search of the register; and

(g) therefore, it was submitted that leave question (A) ought to be answered in negative.

OUR DELIBERATIONS AND FINDINGS

Appeal by the first defendant against the plaintiffs — Appeal No 22

[23] Having perused the evidence, we are of the view that the learned High Court judge and the learned judges of the COA were correct in their findings that the plaintiffs' claim against the first defendant must succeed. On the evidence led before the trial court by the plaintiffs, in order to prove their case against the first defendant, among others, four documents and the oral

testimony of SP1, have been adduced. To our minds, these four pieces of evidence have materially established the plaintiff's case in showing that the deceased was the rightful owner of the property, as described in P1 and P2. This had formed the first issue before the learned trial judge during trial, namely whether the deceased, as claimed by the plaintiffs, was the rightful owner of the property in question.

[24] At this juncture, it is worth stating that the existence of these four documents was not in dispute. Let us look at them closely. The first document was the SPA. The document was admitted in evidence and it was marked as P1. It was dated 22 December 1997 which was entered into between the first defendant and the deceased. The property was identified in para [3] above and that was not in dispute. Neither was the price of the property in dispute.

[25] The next documentary evidence was the first PA ie P2 dated 26 April 2002. It was a document appointing Nor Zainir bin Rahmat, the deceased in this case, as the 'attorney' who was then granted certain powers, by the grantor, who according to that document was the first defendant in this suit. That first PA had referred to the SPA that was adverted to earlier, namely, P1. That first PA was admitted in evidence as evidence of the plaintiffs and was marked as P2. We noted that P2 had given the deceased certain powers which we must say had far-reaching consequences. We will revert to this a bit more, later in this judgment.

[26] Another single most significant feature in this P2 was its declaration that it was given by the grantor for consideration. That term on consideration was stated in P2 as follows:

> The purchase price for the property has been fully settled by the Attorney. In consideration of the aforesaid, the Grantor agrees that the power of attorney created herein is irrevocable.

[27] The overarching significance of that statement, as granted by the first defendant is that it amounted to an admission by the grantor of P2 that the purchase price for the property had been paid in full by the attorney, namely the deceased. We noted too that P2 had been signed by a director of the first defendant, who had since been adjudged a bankrupt. He was, upon the filing of this suit by the plaintiffs, named as the second defendant. But the plaintiffs had subsequently withdrawn their suit against him upon being apprised of his bankruptcy. The same, if it is to be recalled, had happened to the plaintiffs' suit against the third defendant, another director of the first defendant. The issuance of P2 was made pursuant to D25, the Directors' Circular Resolution passed by the Board of Director ('BOD') of the first defendant. Both P2 and D25 bore the same date, namely 26 April 2002.

[28] Now, looking at the terms of the grant of P2 from the first defendant to the deceased, we had noted the following further terms, as enumerated which had clearly stipulated, as follows:

(1) The Attorney shall cause the property to be transferred in the name of the Attorney or to such other third party as the Attorney may nominate.

(2) The Attorney shall pay all taxes, rates, charges, expenses and other out-going whatsoever payable by the Grantor for or on account of the property or any part thereof.

(3) The Attorney shall receive any and all monies whatsoever receivable or to be received by me or on account of the property or any part thereof.

(4) To rent, charge, sell and let the said Property or to do whatever acts and execute whatever document that give effects to such acts without prior consent from the Grantor.

(5) To furnish, renovate or modify the said Property as may be desirable or necessary for the purpose of developing or managing the said Property.

(6) The Attorney may generally do all such things as may be necessary or expedient in connection with the management of the property as fully and effectively as the Grantor could do.

(7) The Attorney may appoint from time to time one or more attorneys in addition to or in substitution with the same or limited powers stated therein.

[29] In simple terms, it had literally put the deceased in the shoes of the first defendant. What would be the implications of that grant of P2? One of the terms as contained in P2 was that the deceased could exercise powers in dealing with the said property in the like manner as the grantor may have intended to with respect to the said property. The deceased could even transfer the property in his own name or in the name of anyone whom he may wish to nominate. That is stipulated in Term No 1 in P2. Quite apart from that, it was impressed upon us by learned counsel for the plaintiffs that P2 was an irrevocable PA. Does the first defendant still retain any residual power over the property? The short answer to that question, in the circumstances of this case is a 'yes', but with a huge caveat, in that the first defendant's power over the said property is synonymous with that of a bare trustee. That would be on account of, not so much because P2 was an irrevocable PA, but rather, on account of the fact that the deceased had paid for the full price of the said property as admitted to in P2 itself. The nature and extent of that power, as will be seen later in this judgment, is limited and above all else, it cannot be exercised in a manner that will inconvenience the beneficial owner, who has admittedly paid the full purchase price. Also, as will be seen later, in the course of this judgment, a decision of high authority had ruled that a vendor of a property who has

become a bare trustee cannot even lodge a caveat over the property for which its full purchase price he had received from the purchaser.

[30] The significance of these evidence is related to the issue of whether the deceased had indeed made full payment to the first defendant for the property. That fact would, if established, according to learned counsel for the plaintiffs, render them as the beneficial owner of the property. It would also render the first defendant as a bare trustee in relation to the said property, whereby in law, it could not deal with the property as though it still belongs to it but rather, the first defendant was holding the property in trust for the deceased until such time when the property was registered in the name of the deceased. Going back to P2, Term No 4 therein had empowered the deceased 'to rent, charge, sell and let the said property or to do whatever acts and execute whatever document that give effects to such acts without prior consent from the grantor'.

[31] It had further stipulated that the grantor had agreed '... to ratify and to confirm all and whatsoever that the attorney shall lawfully do in the premises by virtue of these presents'.

[32] The last stipulation in the body of P2 was that, P2 'shall come into force with immediate effect hereof and this power of attorney shall be irrevocable'. P2 was dated 26 April 2002 and it had referred directly to the SPA, ie P1 that was entered into between the deceased and the first defendant on 22 December 1997.

[33] Then there is exh P3, ie the second PA. Reverting back to P2, there was Term No 7 therein which provided for the attorney to '... appoint from time to time one or more attorneys in addition to or in substitution with the same or limited powers stated therein'. Indeed, the deceased had exercised Term No 7 in P2 on 21 May 2002 when he appointed his wife, the first plaintiff in this case, as his substitute attorney. In the context of P3, the deceased was the grantor of the second PA. The essence of Term No 4 in P2 is repeated in P3 with the exception that the substitute attorney has to get consent of the deceased before doing any of the stipulated acts referred to therein. P3 is also an irrevocable PA on payment of RM100 and that P3 'shall continue and subsist notwithstanding the Attorney's death ...'. That is the genesis of P3, the second PA.

[34] In our respectful view, coupled with exh P2, the hand of the deceased, hence those of the plaintiffs, was considerably strengthened on account thereof.

[35] Then there was exh D25. This piece of evidence was tendered through DW1, the liquidator of the first defendant. He was the sole witness called by

the first defendant. D25 is the first defendant company Directors' Circular Resolution dated on the same date as P2, the first PA. It empowered the director of the first defendant to enter into P2 with the deceased. As it had come to pass, the director did sign P2 with the deceased on behalf of the first defendant, witnessed by SP1. Exhibit P2 was annexed to D25. In the circumstances, it would indeed be an insurmountable task for the first defendant to deny P2. Its failure to call the director who signed P2 on its behalf must have, for all intents and purposes, put paid to its denial.

[36] Upon due perusal, we found that the evidence of SP1 who prepared the SPA, ie P1 had stood substantially unscathed. He was present as a witness during the signing of P1 by the relevant parties. In fact, he was involved in the preparation of P2. He was also present to witness the signing of P2 which was also signed by one of the directors of the first defendant on its behalf. There was nothing coming from the first defendant to counter SP1's affirmative evidence in regard to that factual circumstance.

[37] The above had been the salient evidence adduced by the plaintiffs against the first defendant during the trial before the learned High Court judge. What did the first defendant adduce in support of its defence, in particular to rebut the plaintiffs' evidence that had been alluded to in the preceding paragraphs above?

[38] We had occasion to look at its statement of defence ('SOD'), and we found that the first defendant had generally denied the plaintiffs' claim and in particular, in respect of P1, P2 and P3 and it had required the plaintiffs to prove them strictly. From the evidence, by adducing the P1, P2, and P3, the plaintiffs had tried to establish the factum of a sale and purchase transaction between the deceased and the first defendant and that full payment of the purchase price had been made. Via P3, it was the plaintiffs' case that the first defendant did not get any consent or mandate of the plaintiffs when it charged the property to the fourth defendant, who according to the plaintiffs, had been rendered a bare trustee. P3 evinced the fact that the first plaintiff was the substitute attorney appointed by the deceased to be in his place on 21 May 2002.

[39] At this point, we find it opportune to allude to the evidence of SP1. As is clear by now, SP1 was the lawyer acting for the deceased and was a friend of the erstwhile second defendant. He was involved in the preparation of P1 as well as P2. He said he witnessed the second defendant signing on P2 on behalf of the first defendant. P2 was later registered with the High Court as was legally required and a certain fee was paid.

A **[40]** Apart from that, learned counsel for the first defendant submitted that the onus was on the plaintiffs to call the two former directors of the first defendant in order to prove the contents of P2.

B **[41]** With respect, we agree with the findings of the courts below that in the circumstances of this case, as per the evidence adduced, the onus had shifted to the first defendant, to call the relevant witness to rebut the documentary evidence that was signed by the second defendant in order to negate the affirmative evidence as led by the plaintiffs. In law, the general rule is that it does not lie with the party to prove the negative, once he has proved an C affirmative. Here the plaintiffs had, through P2 and the oral testimony of SP1, established that Teow Beng Hur (the former second defendant and a former director of the first defendant) had his name on P2 and that SP1 had testified to the positive act of the director of the first defendant having signed on the same P2, pursuant to the company resolution passed by the first defendant's D BOD. What the plaintiffs were saying, by adducing such evidence, is that they had established a positive factual circumstance, in relation to what was said in P2. It is now the duty of the first defendant to negate that factual circumstance by calling witnesses who could adduce evidence to the contrary.

E **[42]** In the context of this case, the two former directors of the first defendant were crucial officers of the first defendant. They were actually directors of the first defendant at the material time, namely when P2 was issued by the first defendant, in light of D25. In such circumstances, the learned High Court F judge had disagreed with the submissions of learned counsel for the first defendant who had urged the trial judge to invoke the provisions of s 114 illustration (g) of the EA 1950 against the plaintiffs for their failure to call the two former directors of the first defendant. To the contrary, the learned trial judge had invoked the said provisions against the first defendant for having G failed to call the very same persons to testify in support of its case. On appeal to the COA on this point, the learned judges of the COA affirmed the ruling of the learned trial judge in invoking the adverse inference under s 114 illustration (g) of the EA 1950 against the first defendant.

H **[43]** That being the case, the learned trial judge had also held that s 91 of the EA 1950 which essentially prohibits the admission of parole evidence to vary or contradict what has been reduced into writing in a document. The judges of the COA had also agreed with such a ruling by the learned trial judge.

I **[44]** With due respect to counsel for the first defendant, we agree with the judges of the COA on both issues. In our view as well, the evidence of SD1, the court-appointed liquidator for the first defendant had come to court ill-prepared and practically did not have much to offer in terms of evidence that would advance the first defendant's case, let alone effectively rebutting the

plaintiffs' evidence in relation to P2. He was a witness after the fact as opposed to SP1 who was a fact witness, an eye witness, to be exact. SD1 only relied on documents to which he could not personally verified. The tilt in the weight as a result, as found by both the courts below concurrently in favour of the plaintiffs, could not therefore be easily disturbed by us.

[45] The next issue argued before us during submissions was the question of whether the first defendant was a bare trustee for the deceased, and hence for the plaintiffs on account of exh P3. It was argued, as could be seen in the preceding paragraphs above, that both the trial judge as well as the COA had found that full payment had been made by the deceased. P2 was clear on that regard.

[46] Learned counsel for the first defendant argued that the failure of the plaintiffs to produce any receipt evincing the said full payment made must be taken adversely against the plaintiffs. It would appear that the argument goes to the sufficiency of the evidence adduced to evince full payment having been made. We say so because the law on the creation of a bare trustee relationship between a purchaser of a property who has fully paid for it and the vendor of that property, is rather settled. In the case of *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20 ('*Yeong Ah Chee*'s case') the then Supreme Court had occasion to hold, inter alia, as follows:

> [1] It is an old and well settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land. When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser.

[47] That statement of legal principle was made by the then apex court after it had considered the legal position on the matter, not only here but also from other jurisdictions.

[48] Learned counsel for the first defendant cited to us the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561 ('*Borneo Housing*'s case') and urged us to agree with him that there is more that the purchaser would have to show before rendering the vendor first defendant, as a bare trustee for the plaintiffs in this case.

[49] Having considered the submissions made on behalf of the first defendant on the issue of bare trustee, we are with respect, unable to accede to such submissions. Having read the *Borneo Housing* case, it was clear to our minds as to where the learned counsel for the first defendant had come from. Although that case had originated from Sabah, where the provisions on indefeasibility of title upon registration were found to be rather unclear, in the

final analysis, the apex court there found that the necessary inference to be made upon the true reading of s 88 of the Sabah Land Ordinance ('the SLO'), must be that registration is still a key consideration in what their Lordships there had termed the SLO as a modified Torrens System. Upon that premise, the apex court in the *Borneo Housing* case, concluded that the priority issue that was before the court, must be answered in favour of the chargor bank which had registered its charge over the property for which the purchaser had paid full payment, but that the latter did not register its interest therein. Central in the decision of the apex court in the *Borneo Housing* case has been the contention that *merely* having paid in full the purchase price for the property by the purchaser ought not to confer on him any beneficial interest in the property and at the same time render the vendor a mere bare trustee for such purchaser. The famous dictum of Jessel MR in *Lysaght v Edwards* (1876) 2 Ch D 499 ('*Lysaght*'s case') was referred to. More pertinently, a reference to that *Lysaght*'s case by the High Court at Shah Alam in the case of *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211 ('*Ahmad bin Salleh*'s case') as a premise to rule that the conclusion of the sale and purchase agreement between two contracting parties over a property would confer a beneficial interest in the property in favour of the purchaser was declared by the apex court in *Borneo Housing*'s case to be plainly wrong. It went on to state that *something more* must have taken place before the vendor could be deemed to have intended to divest his interest in the property which it has sold and obtained full payment for from the purchaser.

[50] We reproduce in quote below what the learned Justice Edgar Joseph SCJ had said in *Borneo Housing*'s case at p 581 of the report, like so:

> In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

[51] That something more could come in the form of a ready memorandum of transfer and/or the issue document of title ('IDT') of the property. The work on the *National Land Code* (1st Ed) by learned author Judith Sihombing was also cited by the apex court in the *Borneo Housing*'s case. As nothing of that sort was ever exhibited in the records of appeal in the case before them, it could not therefore be right to rule, as did the learned trial judge in the *Borneo Housing* case, in favour of the purchaser. Or to put it differently, the first defendant vendor in the *Borneo Housing* case had not been proven to have divested his interest in the property although he had, without dispute, accepted full payment and settlement of the purchase price from the purchaser. That being the state of affairs between the parties, the vendor still had the legal interest to

pass to the bank when the former went on to charge the property to the bank as a security for a loan facility. Based on factual matrix as to what had transpired in *Borneo Housing*'s case, learned counsel for the first defendant had urged upon us to also rule in favour of his client, the vendor in this case before us.

[52] Now, in the context of the evidence in the immediate appeal before us by the first defendant, we find, just like the courts below, that the deceased had paid the full purchase price for the property. Exhibit P2 is clear proof of that fact. The first defendant had failed to lead evidence of a credible nature, or at all, to rebut what was contained in P2. P2 also is a document that evinces, to our minds, a clear intention on the part of the first defendant to divest its interest in the property to the attorney, namely the deceased. The fact that the first defendant had all the knowledge and consent in entering the PA with the deceased was clearly shown by D25, the BOD's resolution of the first defendant. Exhibit P2 had effectively put the attorney into the shoes of the first defendant. It had authorised the attorney, to wit, the deceased, to even transfer the property into the name of the attorney himself or into the name of any person whom the attorney may in his entire discretion nominate. It is in evidence led by the first plaintiffs that the title was already issued and was ready for registration in the name of the first plaintiff. However, the developer had decided to register the name of the first defendant as the registered owner of the property. At that time, the first plaintiff could not afford to pay the fees payable to get the title of the property to be transferred into her name. But that having been said, the first plaintiff had been paying for the quit rents of the property and she had been collecting rentals due to the property as though she was the registered owner of the said property. If it is to be recalled, all these acts were consistent with the dictates of the terms as contained in P2. There was no evidence led by the first defendant's sole witness, namely the liquidator, close to even rebutting such evidence led by the plaintiffs' witnesses in that crucial regard. But indeed, if one were to recall what was agreed to by parties in P2, one could not miss that P2 also stipulated that the grantor, namely the first defendant, 'hereby agrees to ratify and confirm all acts of the Attorney' pursuant to the terms of that instrument. Thus, on the available evidence, the first defendant had evinced a clear intention, by its conduct, to part with the property in favour of the plaintiffs. This was in addition to the undisputed facts, namely that it had executed the sale and purchase agreement ('P1') with the deceased, the signing of D25, the signing of the first power of attorney ('P2') and the admitted acceptance of the payment of the purchase price for the property from the deceased.

[53] With respect, it is our considered view that P2 which was duly registered with the High Court at Kuala Lumpur on dated 30 April 2002 (see *Rekod Rayuan Tambahan Bahagian* C *Jld* 2 in Appeal No 28, encl 10, p 734) read with P1 ie the SPA, had effectively rendered the vendor first defendant as a bare

trustee for the deceased and later, for the substitute attorney ie the first plaintiff. With that finding, it follows that when the first defendant charged the property to the fourth defendant bank as a security for the financial facility from the bank, it had actually no more interest in the property to be made as a security. It had by then become incapacitated in relation to dealing with the said property to act in any manner that would be adverse, or in the words of Lord Justice Turner, to be 'an inconvenience' to the beneficial owner.

[54] The apex court in the *Borneo Housing* case made a passing reference to the earlier decision of the then Supreme Court in the case of *Yeong Ah Chee*'s case. We noted that it made no adverse remark about it. Rather, it recognised the reach of the *Yeong Ah Chee* case decision by stating the following:

> And, in *Yeong Ah Chee v Lee Chong Hai*, the Court went so far as to suggest that the concept of the bare trust in a vendor and purchaser situation applied under the Malaysian Torrens System by virtue of the Civil Law Act 1956.

[55] We find the *Yeong Ah Chee* case is important for what was said by learned Justice Peh Swee Chin SCJ who wrote the apex court's judgment, when he said:

> It is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land. Please see *Lysaght v Edwards* [1976] 2 Ch D 499 and this case was cited with approval very often in our courts eg by the Federal Court in *Intercontinental Miners Sdn Bhd v Society Des Etains De Banjas Tudgu* [1974] 1 MLJ 145 and *Temenggong Securities Ltd v Registrar ofTitles, Johore* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee ie unqualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam v Tham Kong* [1980] 2 MLJ 159, PC that 'the Torrens System is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.

[56] The essence to be derived in that short but concise paragraph is that equitable principles can coexist with legal and statutory principles under the Torrens System. As was alluded to earlier, the apex court in *Borneo Housing*'s case did not say that *Yeong Ah Chee*'s case was wrongly decided. With respect, we agree because *Yeong Ah Chee*'s case was decided based on sound principle.

[57] Indeed, the above principle had been adopted and followed by the Federal Court in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45; [1974] 1 LNS 175 ('*Temenggong Securities* case') which held that:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[58] There was no reason for the *Borneo Housing* case panel of the Supreme Court to have viewed the *Yeong Ah Chee* case in any adverse light. Indeed, the learned justices in the *Borneo Housing* case only found it justified in overruling the *Ahmad bin Salleh*'s case for fairly obvious reasons. Since the vendor who has become a bare trustee for the purchaser, he can no longer deal with the property for which the purchaser has paid in full, including utilising it as a security for a loan extended in its favour by a third party. If one were to juxtapose the evidence which had been led by the plaintiffs in this immediate appeal before us with that which was led for the plaintiff in the *Ahmad bin Salleh*'s case one would readily see why the learned justices in the *Borneo Housing* case had found that the circumstances in the *Ahmad bin Salleh*'s case had fallen far short of rendering the vendor there a bare trustee.

[59] In fact, in a relatively recent Federal Court case of *Samuel Naik*'s case it was, inter alia, in para 65 that:

> There is nothing in the NLC which expressly or by necessary implication excludes or prohibits any equitable interest in alienated land, and the court ought to give effect to ordinary commercial transactions and not to invalidate any equitable mortgage created by contracts outside any statutory provisions for registration of title under the NLC.

[60] That *Samuel Naik*'s case also decided that once the vendor had received full payment of the purchase price from the purchaser, the vendor becomes a bare trustee. And in that legal capacity, the vendor was not permitted in law to sell or transfer the land to new purchasers. Any subsequent conveyances of the same property to new purchasers would thus be void as the vendor, by then being a bare trustee, did not have the requisite capacity to enter into such agreement. It goes without saying that creating a charge over such property would be tainted by the same incapacity. In para 77, the apex court in *Samuel Naik* held that the failure on the part of the original purchaser to lodge a caveat timeously did not in any way negate or defeat its equitable right, title or interest in the property under scrutiny.

[61] On the facts of the case before it, the apex court in the *Samuel Naik*'s case had answered the question posed by stating that a registered title of a bona fide immediate purchaser for value without notice under the NLC can be defeated by a non-registered valid equitable interest of an absolute assignee under an earlier SPA in respect of the same piece of land (see para 86).

[62] In the factual matrix of the case presently before us, a pertinent question to ask appears to be whether the deceased had a valid equitable and beneficial interest in the property. But, before we proceed to answer that question, we must first look at the pleadings of parties to see whether it was the pleaded case of the first defendant or that of the fourth defendant that the plaintiffs had no valid equitable interest in the property. We raise this question because it was submitted by learned counsel for the first defendant during oral submissions, that the SPA was never concluded as some preconditions stated in P1, including one relating to the need to obtain prior state consent were not fulfilled. But be that as it may, it was not upon the deceased that the preconditions needed to be fulfilled. Those preconditions were beyond the deceased's capacity to fulfil.

[63] Reverting back to the pleadings on the matter of the SPA ie P1, upon due perusal, we found that the first defendant in its SOD did not aver as its defence that P1 was never a concluded contract between the parties. The defence was a general bare denial in so far as this issue was concerned. In other words, it was never the pleaded case of the first defendant that the SPA was never concluded and that it was never concluded because the requisite consent of the state authority was never obtained. In fact, its sole witness, SD1 was not aware of the status of P2. The position of the first defendant on the issue had become more tenuous when P2 was referred to P1 as the basis for the former's existence. When SP1 was on the witness stand, during his cross-examination by the counsel for the first defendant, it was *suggested* to him that P1 could never be effective because there was no consent from the state authority to which SP1 answered he had no knowledge of such a factual circumstance. However, the first defendant never *put* to SP1 that P1 was not concluded on account of the suggested fact of no consent was obtained from the state authority. In other words, it was just a bare suggestion, nothing more. Such suggestion made could never prove the fact that was suggested to a witness. There has to be more than just a mere suggestion in order to establish a fact as proven. A mere suggestion posed to a witness is easily dismissed by a court answer in the negative. In the context of the pleadings of the first defendant, it would be irresistible to surmise, not without good reason, as to why the first defendant did not put to SP1 what was suggested to him. The reason is that it was never the pleaded case of the first defendant that P1 was never concluded because the consent of the state authority was never obtained. Had it put that factual circumstance to SP1 during the latter's cross-examination, it would be obligated to lead evidence to that effect. That it would not be able to do, because such was not its pleaded case. It would have been estopped.

[64] The nub of this principle was neatly captured by learned Justice Mahadev Shankar in his article *Putting and Suggesting in Cross-Examination* [1984] MLJ xi, in the following words:

> It is well established that when matters are 'put' in cross-examination by defence counsel it is implied that positive evidence will be called to prove the matters put. On the other hand where all that is done is to 'suggest' to a witness that a fact is not so, then what is meant is that the assertions of the witness are inherently incredible but that no positive evidence will be called to contradict the statement.

[65] It is trite that parties are bound by their pleadings, or the lack of it. What a party does not plead, he cannot lead facts or issues on the non-pleaded fact. Again, *Samuel Naik*'s case is instructive on this point. Learned Justice Ramly Ali FCJ writing on behalf of the apex court in the *Samuel Naik* case said as follows in the matter of the pleading point:

> Parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded. Where a vital point is not raised in the pleadings it cannot be allowed to be argued and to succeed on appeal.

[66] The case of *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 was cited, among others, in support of that proposition. It is worth noting that in the *Samuel Naik* case, the appellant had attempted to raise the issue that MPM was not the registered proprietor of the land at the last minute to which the apex court ruled 'must be disregarded and not to be considered at all in determining the appeal'. This is because to allow it to be ventilated would adversely affect the respondent's defence and would be highly prejudicial to the respondent so late in the day.

[67] Indeed, the courts should only consider the pleaded case of the parties before them. In *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357, it was said, that:

> But once a defendant takes that course, he must stand and fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct.

[68] Likewise, in this case immediately before us, the issue of the non-conclusion of P1 was never pleaded in the first defendant's SOD, and even if it was pleaded, it was not pleaded sufficiently. In terms of evidence, there was nothing coming from the first defendant that had shown eagerness on its part to drive home this purported issue to the front. The liquidator never testified to that as an affirmative fact, and neither was it put to the lawyer SP1 that such was the first defendant's case vis a vis P1 during his cross examination. Failure to properly cross-examine a witness of the adverse party means there is an admission to the fact advanced by the adverse party (see *Browne v Dunn* [1893] 6 R 67 and *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 as examples).

[69] If it was the first defendant's case that P1 was not concluded, that matter ought to have been raised as a defence in its SOD. But it was not. What it had done was to deny almost everything and put the plaintiffs to strict proof. Neither did the liquidator, Mr Tee Siew Kai, who was called as the sole witness for first defendant, advert to such evidence in his testimony.

[70] As such, in light of the state of pleadings by the first defendant and the evidence led in court, it would be unjust to the plaintiffs if the issue of the alleged non-conclusion of P1 is allowed to be ventilated and considered by us at this stage. It is already too late in the day for that to happen.

[71] Both the courts below agreed with the plaintiffs that s 91 of the EA 1950 ought to be invoked against first defendant in that no parol evidence shall be permitted to contradict what has been reduced by both parties into writing in P2. This is commonly referred to as non-admissibility of parol evidence in circumstances referred to in s 91 of the EA 1950. Codified from the English common law, parol evidence rule is a rule that preserves the genuinity or authenticity or integrity of a written document. It was first established in the case of *Goss v Lord Nugent* (1833) 5 B & Ad 58 and it was then concisely stated by Innes J in *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) L 252. The rule would operate to prohibit the parties from amending the meaning of the written document through the use of previous oral declarations that are not stated in the document itself. When parties had discussed and negotiated the terms of a contract, this process means that they have integrated the contract. In essence, the document can only be interpreted from considering what are contained within the four walls of the document, in this case, P2. In the context of this case before us, P2 was made pursuant to D25 which was passed on 26 April 2002, the same date as P2 itself. Their contemporaneity cannot therefore be denied. It cannot lie in the mouth of the first defendant to now deny P2 and its contents. With respect, we agree with the findings on this by the lower courts.

[72] Even in the event that parol evidence is permissible in respect of P2, the lower courts were also correct in invoking adverse inference against the first defendant for its failure to call its two directors to testify on its behalf to rebut the contents of P2, a document signed by one its directors and witnessed by SP1. It is also telling in that the first defendant never lodged a police report in respect of P2, and it never challenged its authenticity in its SOD. Neither did it send P2 to a chemist for that purpose. On the contrary, D25 evinced the fact that P2 was authorised by the BOD of the first defendant itself.

[73] In any event, the beneficial interest in the property was created in favour of the deceased on account of the full payment of the purchase price of the property by the deceased and admittedly received to be so by the first defendant

in the first PA, ie P2. Indeed, P2 was created by the parties, with specific reference to the SPA dated the 22 December 1997 the only SPA entered into between the deceased and the first defendant in respect of the said property.

[74] It bears noting and is very telling that P2 was signed on 26 April 2002, nearly five years after the signing of the SPA. The complaint by the first defendant through submission made very late in the day that P1 was not concluded could not stand in light of the fact that even after five years, the first defendant had found it fit and proper to use it as a premise to enter P2 with the deceased. As such, the combined effect of the above factors must be that the deceased had become the beneficial owner of the property and the first defendant had become a bare trustee for him in relation to the said property, on the balance of probabilities. Even on the terms envisaged by the *Borneo Housing* case that required something more be shown, the evidence led by the plaintiffs were sufficient to fulfil such requirement to evince the fact that the first defendant had intended to divest its interest in the said property via the first PA, ie P2.

[75] In the circumstances, there is nothing invalid about the equitable interest of the deceased, hence the plaintiffs, in the said property. Once that is established to be the case here, the first defendant was rendered a bare trustee. Once first defendant is a bare trustee, it could not in law pass any interest in the said property to the fourth defendant by way of creating a security for the charge over it in favour of the fourth defendant. It is void ab initio (see, *Samuel Naik*'s case as an analogy).

[76] In gist, the case here has been that the title or interest of the fourth defendant loses out because: (1) it gets no good interest under the charge from the first defendant as the latter was a bare trustee. In other words, s 340(2) of the NLC kicked in to render its title not indefeasible; and (2) It was an immediate purchaser, as opposed to it being a subsequent purchaser, and the implication is that the fourth defendant was not entitled to avail itself to the proviso to s 340(3) of the NLC. In other words, the fourth defendant had obtained no valid interest from the charge transaction that it entered into with the first defendant. As such, the learned judges of the COA were correct when they ruled that in the circumstances, the issue of the fides of the fourth defendant was indeed irrelevant. They had observed that the learned trial judge was wrong when he concerned himself with the issue of the fides of the fourth defendant when in fact and in law, he had not made a finding as to the status of the fourth defendant, before taking into account the proviso to s 340(3) of the NLC. With respect, we agree with the approach taken by the COA.

[77] To recap, for Appeal No 22, the questions of law allowed by the leave panel are as follows:

Question (a): Whether in a transaction involving landed Property without title, the concept of bare trustee and/or beneficial ownership can arise where the conditions precedent of an agreement made between the parties have yet to be fulfilled and the underlying transaction has yet to be performed to completion according to the agreed terms thereof?

Answer: This question cannot be answered because the evidence adduced by the first defendant failed to establish that P1 was not concluded. It was only a suggestion made to SP1 during his cross-examination. The first defendant has failed on evidence to prove that P1 was yet to be fulfilled. Indeed, it was never the pleaded defence of the first defendant that P1 was never concluded. In other words, P1 was a performed SPA. Therefore, the factual matrix in this appeal does not enable us to answer the question as posed which was premised on the supposition that the P1 was not concluded/fulfilled. We therefore would decline to answer this question.

Question (b): Whether a statement contained in a SPA and/or a PA stating that a certain purchase price has been paid can be accepted as final and conclusive proof of such payment where no positive evidence is adduced in support thereof?

Answer: That would depend on the facts surrounding the PA. Here, exhibit P2 was registered and irrevocable and was for consideration as the purchase price had been paid in full by the deceased. It is an admission as to full payment having been made by the deceased as it was signed by a director/manager of the first defendant and witnessed by a lawyer ie SP1. No issue of non est factum was raised as a defence by the first defendant, who called only the liquidator as its witness. Surely such a witness who came after the fact, could not shed any useful light on what had transpired pertaining to P2. Indeed, it was entered into between the first defendant and the deceased on account of the enabling D25 ie the Directors' Circular Resolution of the first defendant, dated on the same date as P2 itself. The plaintiffs had called SP1, the lawyer who witnessed the signing by the director/manager of the first defendant. It was also registered with the High Court on payment of requisite fees. In the circumstances of this appeal, it has been proven on the balance of probabilities that the full purchase price had been paid by the deceased. The answer is therefore in the affirmative.

Question (c): Whether a donor of a PA executed in relation to a landed Property is subsequently prevented from dealing with the said Property, including creating a legal charge under the provisions of the NLC?

Answer: Depending on the facts surrounding the PA itself. Here exhibit P2, which is an irrevocable PA was issued pursuant to D25 had evinced the fact, thereby pointing irresistibly to the knowledge on part of the first defendant that full payment had been made for the said Property, thereby rendering the vendor 1st Defendant as a bare trustee. Once a donor becomes a bare trustee, he stands in the same shoe as a vendor similarly circumstanced. Both are incapable of any further dealing with the said Property, including creating a charge under the NLC over the said Property. The element required under the *Yeong Ah Chee* case has been fulfilled by the plaintiffs. Even on the higher threshold envisaged by the *Borneo Housing* case the something more proof was provided by P2 which had practically put the deceased into the shoes of the first defendant vendor/bare trustee, as evincing the intention on the part of the bare trustee to part with the property to the deceased.

Therefore, the answer is in the affirmative.

[78] It is therefore our considered view that as the evidence stood as adduced by both parties in this case, the plaintiffs had succeeded in establishing their case against the first defendant, on balance of probabilities.

Appeal by the fourth defendant against the plaintiffs — Appeal No 28

[79] In respect of the appeal by the plaintiffs against the fourth defendant bank in the COA, the COA judges allowed their appeal on the ground that the bank was an immediate holder of the charge and on account of that fact, the bank was not in a position in law to avail itself to the proviso under s 340(3) of the NLC. In the words of the judges of the COA, the fides of the fourth defendant were an irrelevant consideration. According to the COA, the learned trial judge had failed to apply the test as laid down in the Federal Court case of *Samuel Naik* which states that as a first step, the trial hearing a matter pertaining to the operation of the proviso to s 340(3) of the NLC, must determine whether the party that seeks the shield of indefeasibility of its title or interest, must show through evidence that it was a subsequent purchaser, and not an immediate purchaser. It is the subsequent purchaser that has the opportunity to avail the protection under that proviso. A subsequent purchaser will succeed if it later on proves itself to be a bona fide purchaser for value. This is clearly expounded in the Federal Court case of *Tan Ying Hong*. We reproduce the relevant portion of that seminal judgement in *Tan Ying Hong* like so:

> [51] We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340.
>
> [52] Furthermore, even though sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted there out. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s(3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s (2)(b). By so doing, the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.
>
> [53] For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing, the Federal Court gave recognition to the concept of immediate

A indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

[80] Having perused through the judgment of the learned trial judge, we noted that there was indeed no reference made by the learned trial judge to the B direction that was adverted to in the *Samuel Naik* case, which direction was attributable to the earlier decision of this court in *Kamarulzaman*'s case. The learned trial judge found that the fourth defendant was a bona fide holder of the interest in the property by way of its registered charge over it. In this respect, we agree with the COA's appreciation of the trial judge's manner in which His C lordship had directed his mind on this issue. The COA was rightly concerned in that regard. In other words, there was no telling as to how the fourth defendant was in fact, found by the learned trial judge as a subsequent purchaser, so as to be eligible to seek protection under the proviso to s 340(3) of the NLC. His non-direction had led him to come to the erroneous finding D that the fourth defendant was a subsequent purchaser.

[81] We agree that, as it is quite trite, to be eligible to seek protection under the proviso to s 340(3) of the NLC, the party seeking such protection must qualify through a two-step process. First, it must establish itself as a subsequent E purchaser of the property in dispute. Second, it must show itself to be a bona fide purchaser for value. The apex court decision in the *Kamarulzaman* case had laid down the process which the trial court concerned with the issue of indefeasibility of title, in particular the proviso to s 340(3) of the NLC will have to direct its mind accordingly, like so:

F

> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent G purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from Tan Ying Hong that the bona fides of an immediate purchaser is not a shield to defeasibility. The defeasible title of a bona fide immediate purchaser is still liable to be set aside. The defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a H bona fide subsequent purchaser. That the fifth and sixth respondents were bona fide purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were bona fide subsequent purchasers. But for the fifth and sixth respondents to have been bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth I respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title

of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth Respondents was also defeated.

[82] Learned Justice Jeffrey Tan FCJ also set out a guide for the trial court judges faced with having to resolve similar issues when dealing with s 340 of the NLC, which we now would reproduce as follows:

> [46] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the bona fides of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s 340(2) would not affect the title or interest of a bona fide subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a bona fide subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[83] That having been said, however, we also' noted that the COA judges did not as well elaborate on the evidence adduced before the trial court as to how they had come to the conclusion that the fourth defendant was in fact an immediate holder of the interest in the said property, to wit, the charge.

[84] In the circumstances, it has fallen to us to appreciate the evidence adduced and then conclude as to the status of the fourth defendant in the scheme of things in this case. From the due perusal of the evidence adduced, the first defendant had through P1 ie the SPA sold the property to the deceased in 1997 and that transaction was further confirmed by the issue of the first PA to the deceased in 2002 pursuant to D25 that was earlier passed by the first defendant's BOD on the same date. By reason of the fact that the first defendant had received full payment for the property from the deceased, in favour of whom it had made an attorney via an irrevocable PA, ie P2, the first defendant had become a bare trustee. In that capacity, it had later on charged the said property to the fourth defendant as security for a loan facility from the bank. In the circumstances, the fourth defendant bank here, just like the appellant Samuel Naik Siang Ting in the *Samuel Naik* case is an immediate purchaser of the said property when it registered its charge over the said property. But the first defendant was devoid of any interest in the said property, being rendered a bare trustee earlier on when it had received full payment of the purchase price for the property from the deceased. As such, the first defendant could not pass any good title to the fourth defendant. The transaction between

the fourth defendant and the first defendant was caught by s 340(2)(b) of the NLC, although it was not a privy to the very act which renders the instrument being void or insufficient. See again, the case of *Tan Ying Hong* where learned Chief Justice Zaki Azmi had occasion to say at p 8 of the report, thus:

> [8] The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (see s 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.

And if we may add, 'or by an insufficient instrument' (see, the COA case of *Malayan Banking Bhd & Ors v Tho Siew Wah & Anor and another appeal* [2017] 2 MLJ 721; [2017] 7 CLJ 573 at para 37 and in particular para 38 therein, where the court there said:

> As long as the registration pursuant to the immediate purchase of the land was obtained through forgery or the use of a *void or insufficient instrument,* no indefeasibility of title is conferred by law under the NLC, *whether or not the purchasers were privy to the vitiating acts mentioned under* section 340(2) of the NLC). (Emphasis added.)

[85] For ease of reference, we reproduce s 340(2)(b) of the NLC below:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument;

[86] A registered title that is defeasible on account of the vitiating acts committed by their perpetrators, is liable to be set aside by the previous owner who has a good title or by a bona fide subsequent purchaser for value, of the property. We need to emphasise here that the previous owner of the property need not be registered. What is required is that the previous owner must have good title. It does not matter whether it is legal or equitable in nature. The act of registration on the register maintained at the land offices, ipso facto, provides such title or interest a shield of indefeasibility, but as could be seen above, a

registered title or interest shall not be indefeasible if the vitiating factors can be shown to have been employed in the transaction when such title or interest was obtained. It is an imperative direction by law, couched in a mandatory language. A good title or interest in a property remains as such, regardless of whether it is registered or not. Registration confers on the registered owner, ipso facto, the shield of indefeasibility. In the Privy Council in *Frazer v Walker and Radomski and Radomski* [1967] 1 AC 569 indefeasibility was described as follows:

> The expression not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[87] Reverting to our immediate appeal, under the NLC, only a bona fide subsequent purchaser for value is protected under the express proviso to s 340(3) of the NLC. In this case before us, it is clear that the fourth defendant had its loan secured by registering a charge over the said loan immediately from the first defendant. At that material time, the first defendant had no longer any interest to be dealt with because it was then only a bare trustee for the deceased. In other words, no interest passed to the fourth defendant when the charge was registered by the fourth defendant. The transaction between the first defendant and the fourth defendant was a direct and immediate purchase. It was a transaction that was vitiated by s 340(2) of the NLC as it was based on an insufficient or otherwise, void instrument, as the first defendant could not pass any title or interest in respect of the said property to the fourth defendant.

[88] That being the case, the fourth defendant being an immediate purchaser, under the law, it must have its interest by virtue of the registered charge, defeasible. Being an immediate purchaser, the fourth defendant, in the circumstances of this case, cannot invoke the proviso to s 340(3) of the NLC. Learned Justice Raus Sharif JCA (as he then was) stated his interpretation on the application of the proviso to s 340(3) of the NLC in the following terms, in the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136:

> To me, by virtue of s 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s 340(2). The proviso states 'Provided that in this subsection' and this subsection refers to s 340(3) and not s 340(2). Section 340(3)(a) refers to 'to whom it may subsequently be transferred' which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser.

[89] The apex court in the *Tan Ying Hong* case endorsed that interpretation in respect of the true import of the proviso to s 340(3) of the NLC. The view held by the apex court in the case of *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 on the same issue was ruled as erroneous and unjustified.

[90] That being the case, the fides of the fourth defendant became irrelevant. The fourth defendant could have been a bona fide purchaser for value, or indeed, a truly an innocent one, but s 340(2) of the NLC does not excuse such a circumstance, however innocuous. A title or an interest registered that was obtained through the vitiating factors enumerated under s 340(2) of the NLC shall not be indefeasible and is liable to be set aside by the rightful owner of the subject property.

[91] It would have been different if the fourth defendant had entered into the charge agreement with a person, say Mr A, who had bought the said property from the first defendant and that Mr A then charged the said property to the fourth defendant. There is however a caveat to be made here, namely, that when Mr A bought the said property from the first defendant, Mr A must have bought the said property in good faith. In the scheme of things, that Mr A would stand in a position of an immediate purchaser. As such, although he is a bona fide purchaser, his title over the said property, although registered, is defeasible by virtue of s 340(2) of the NLC. As an immediate purchaser Mr A cannot pass a good and an indefeasible title to whoever were to purchase the said property from him.

[92] Going on with our hypothetical scenario, if that Mr A were to get a loan from the fourth defendant in order to finance his purchase of the said property from the first defendant, for which the fourth defendant, if it was a bona fide purchaser, created a charge over the said property and had it registered, then the fourth defendant would become a subsequent purchaser. It had purchased the interest in the said property from Mr A who, though was a bona fide purchaser, was nevertheless an immediate purchaser. While Mr A's title is defeasible under s 340(2) of the NLC, the interest of the fourth defendant, will be protected by virtue of the proviso to s 340(3) of the NLC. It is because, the fourth defendant, in the given scenario, is both a subsequent purchaser (from Mr A, a bona fide purchaser) and itself being a bona fide purchaser as well.

[93] Transpose that onto our immediate appeal, by analogy, the position of the fourth defendant in this appeal before us is exactly that of Mr A. It could not therefore, being not a subsequent purchaser, avail itself to the protection that was offered under the proviso to s 340(3) of the NLC, which provisions we now reproduce below, as much has been said about it. With the said proviso, it reads as follows:

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[94] An important take-away from the above is that, while the bona fide of Mr A, although proven, will not save him from the vitiating effect of s 340(2) of the NLC, nevertheless, his bona fide, if proven, would greatly assist in establishing the fourth defendant as a subsequent purchaser, thereby enabling the latter to avail itself to the benevolent and protective embrace of the proviso to s 340(3) of the NLC.

[95] In the final analysis, we are left with the following scenario. The first defendant, having been rendered a bare trustee for the deceased, had no interest whatsoever in the said property. The fourth defendant had a registered interest in the charge that was defeasible, as it was obtained from the first defendant via a void instrument. The plaintiffs, being the administrators of the estate of the deceased, who was a beneficial owner of the said property are therefore the rightful owner, albeit an equitable one. As was observed by Lord Russel of Killowen in *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159, PC ('*Oh Hiam*'s case') that 'the Torrens System is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience'. The applicability of rules of equity in our country, as stated by Justice Peh Swee Chin in *Yeong Ah Chee*'s case is founded upon the Civil Law Act 1956. This was accepted and reiterated by the apex court again in the *Samuel Naik* case, against which we could find no reason to offer a contrarian view.

[96] As was reiterated in the case of *Samuel Naik* there is nothing expressly stated in the NLC that excludes the applicability of the rule of equity otherwise known as rule of good conscience.

[97] In this case, lest we forget, it must be reiterated that in the overall scheme of things, after all the dusts have settled, there was actually no contest of competent priorities between the fourth defendant and the plaintiffs, for the simple reason that the former had no legitimate title or interest to begin with over the said property. Much less the first defendant, who had been rendered as a bare trustee of the plaintiffs, and was thereby incapacitated to further deal

with the property. Learned author, David SY Wong in his book entitled, *Tenure and Land Dealings in the Malay States* at p 364 wrote the following:

> The instrument may also be 'insufficient' or 'void' for reasons relating to *the capacity of the parties concerned,* or by reason of some formal defect or irregularity. (Emphasis added.)

[98] The result is that the interest, albeit registered, of the fourth defendant bank, in relation to the charge is not indefeasible. The fourth defendant could not avail itself to the proviso to s 340(3) of the NLC because it was not a subsequent purchaser. Being an immediate purchaser, the fact that the fourth defendant might be, for all intents and purposes, a bona fide purchaser for value without notice, would not amount for much, or at all. Its registered interest vide the charge is defeasible because the first defendant was a bare trustee. As long ago as 1865, Lord Justice Turner had occasion to say in the case of *Hadley v London Bank of Scotland* (1865) 12 (LT) 747 ('*Hadley*'s case') to say the following:

> I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by lis pendens. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; *the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.* (Emphasis added.)

[99] These words of Lord Justice Turner or their effect, had played a major role in moulding Jessel MR's now famous dictum as expressed in the *Lysaght*'s case. As is clear by now, that dictum has since been followed rather rampantly by our courts when dealing with the issue of bare trustee. The plaintiffs had been inconvenienced by the first defendant's conduct in relation to the property when it charged it to the fourth defendant and its subsequent foreclosure when the first defendant defaulted in servicing the loan facility. The apex court cases of *Temenggong Securities*, *Yeong Ah Chee* and *Samuel Naik*'s case are a few examples of such local cases. In *Yeong Ah Chee*'s case, learned Justice Peh Swee Chin SCJ, referred to Lord Russel of Killowen's words in the Privy Council case of *Oh Hiam* that 'the Torrens System is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience'. Justice Peh Swee Chin J also was mindful of salutary effect to remind ourselves of the fact that rules of equity apply to this country by virtue of the Civil Law Act 1956. As had been alluded to earlier, it is a matter, which learned Justice Edgar Joseph Jr SCJ in the *Borneo Housing* case noted as suggesting that such equitable situation between an equitable purchaser and a vendor applies and is recognised under the Torrens System.

[100] As such, we agree with the COA that the fourth defendant was an immediate purchaser and was therefore not protected under the proviso to s 340(3) of the NLC. Its registered charge over the said property is not entitled to the protection of the shield of indefeasibility. It had purchased the interest in the property from the first defendant who had no interest to be dealt with anybody and to the detriment of the deceased. On account of the *Hadley*, *Yeong Ah Chee*, *Samuel Naik* and *Kamarulzaman*'s case, it is clear to our minds that the vendor had become a bare trustee and that when it created a charge over the land and used the land as a security for a loan from the fourth defendant, it had no more proprietary interest in the property, other than as a bare trustee. The charge transaction was null and void, pursuant to s 340(2) of the NLC. As an immediate purchaser, the fourth defendant was not entitled to protection under the proviso to s 340(3) of the NLC, regardless of its fides. As such, not only the original owners that may lose out, but an innocent immediate purchaser may also suffer the fatal deprivation of the protection afforded under the proviso to s 340(3) of the NLC. Indeed, learned Justice Richard Malanjum, CJSS (as he was then), in *Pushpaleela*'s case had occasion to make the following remarks:

> In fact, in some cases, the party losing out may not necessarily always be the original registered proprietor. It may even be the immediate purchaser affected by the application of the principle of deferred indefeasibility as affirmed by this court in the case of *Tan Yin Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 at para 53. Thus, as between a bona fide immediate purchaser and the original registered proprietor, the said immediate purchaser stands to lose by reason of the fraud of another.

[101] The immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property that is being used as a security from a purchaser who is one that is bona fide for value. Any direct dealing with a rogue will necessarily vitiate the transaction rendering it defeasible, although it is duly registered.

[102] Learned Justice Jeffrey Tan FCJ in the case of *CIMB Bank Bhd v Am Bank (M) Bhd & Ors* [2017] 5 MLJ 142 at p 179 ('*CIMB Bank*'s case') had occasion to cite the case of *Wright v Lawrence* (2007) 278 DLR (4th) 698 as supporting, if not propounding, that legal proposition. We reproduce below, his answer, in his dissenting judgment to the question posed before the apex court, like so:

> [90] I would answer the leave question as follows: a chargee is a purchaser within the meaning of the proviso. But the interest of a charge is defeasible, if the chargee were not a subsequent purchaser in good faith and for valuable consideration. Whether a purchaser is an immediate or subsequent purchaser is not determined by a tally of the number of transactions. Transactions could be contrived by fraudsters and

A accomplices (see *Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems* by Pamela O'Connor, Edin LR Vol 13 pp 194–223). A purchaser is a subsequent purchaser only if his title or interest were derived from an immediate purchaser (his vendor) in good faith and for valuable consideration. *For the title or interest of the subsequent purchaser to be indefeasible, both immediate and* B *subsequent purchasers must be purchasers in good faith and for valuable consideration (see Wright v Lawrence* (2007) 278 DLR (4th) 698 at para [39] per Gillese JA, delivering the judgment of the court). (Emphasis added.)

[103] Having so found, we are of the view that there are no competing C priorities between the plaintiffs and the fourth defendant in this case. The plaintiffs are the beneficial owners of the said property whereas the fourth defendant was a party devoid of any legal interest in the property, as the latter was caught by s 340(2)(b) of the NLC because its immediate vendor was an incapacitated bare trustee. The learned counsel for the plaintiffs was not far off D the mark when he submitted, contextually, that everything the rogue touches turns to dust.

[104] Therefore, premised upon the direction in the *Kamarulzaman* case as to the standing of the fourth defendant in the scheme of things in our present E appeal, we find that the fourth defendant was for all intents and purposes, an immediate purchaser or holder of the charge. We say so because it had obtained the purported security in the form of the property over which the first defendant had no more interest over. In other words, the first defendant had nothing to pass over to the fourth defendant as a bare or unqualified trustee for F the deceased purchaser. It matters not that the fourth defendant was a bona fide purchaser for value over the charged land. Indeed, the trial judge had found him to be such a purchaser. But to be protected under the proviso to s 340(3) of the NLC, it must qualify as a subsequent purchaser. Merely being proven or having proved to be a bona fide purchaser for value in relation to the property G is not sufficient to avail oneself to the shield of indefeasibility. One must also be a subsequent purchaser. In this appeal before us, the fourth defendant was dealing with the first defendant directly, a party who could not pass any good tittle to any interest in the property. In such a circumstance, the vitiating provisions under s 340(2) of the NLC would kick in to defeat any interest, H albeit registered, in the charge. As was rightly found by the COA, the fides of the fourth defendant were no longer a relevant issue to be considered, in the prevailing circumstances obtaining in this case. The learned trial judge, with respect, had erred when he delved into the issue of the fides of the fourth defendant without first having determined the status of the fourth defendant as I a purchaser in the circumstances of the evidence before him. We agree with the COA that the learned trial judge had misdirected himself by way of non-direction on a very material element in this case, namely whether the fourth defendant was an immediate or a subsequent purchaser. Had he followed the guide as laid down in the *Kamarulzaman*'s case, he would have

concluded that on the evidence before him, the fourth defendant was, in fact an immediate purchaser.

[105] In *Tan Ying Hong*'s case Arifin Zakaria CJ (Malaya) said at p 22 of the report thus:

> We must stress that, the fact that third respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside at the instance of the registered proprietor namely, the appellant.

[106] We would with respect, adopt that observation *mutatis mutandis,* by inserting the phrase the 'rightful unregistered beneficial owner namely, the respondent plaintiffs' in place of the existing phrase therein, 'the registered proprietor namely, the appellant'.

[107] Looking at the posed question A, it would require a consideration by us as to whether the issue raised on the duty of care was pleaded by the plaintiffs and/or by the fourth defendant. In respect of the issue of duty of care as was raised in question A as posed to us, it was the contention of the fourth defendant that the bank did not owe any duty of care to any third party, such as the plaintiffs. It only owed a duty of care to its customers. Third parties such as the plaintiffs were not foreseeable to the bank and therefore no duty of care arose. We observed two points needed to be made here. One, it was never the pleaded case of the plaintiffs that the bank was negligent against them to their detriment. As such, the plaintiffs did not put upon themselves any onus to prove the tort of negligence against the bank. The plaintiffs' case was premised on the fact that the bank had no good title on the property pursuant to the charge it had registered on the property. The fourth defendant, in the eyes of the plaintiff was an immediate purchaser, who had registered its charge over the property pursuant to a transaction with the first defendant who was a bare trustee of the plaintiffs. And two, it was never the pleaded case of the bank that it was not negligent when it registered the charge on the property. There was no specific particularisation of the negation of elements of negligence on the part of the fourth defendant bank in its SOD.

[108] Premised on the case of *Samuel Naik* this case ought not to entertain such unpleaded issue as to do so would be grossly unfair to the plaintiffs at this very late hour.

[109] There is therefore nothing on the facts of this immediate appeal before us that requires us to not follow the principles in the decisions of this court in the *Samuel Naik* and *Kamarulzaman*cases, inter alia. Likewise, the decisions in the *Pushpaleela* case, the *CIMB Bank* case and the *T Selvam* case were decided on their peculiar facts which the court had decided having applied them to the

existing legal principles premised, inter alia, on the seminal decision in the case of *Tan Yin Hong* especially on the indefeasibility of title in relation to a bona fide purchaser for value in relation to a subsequent purchaser. Essentially, it is a question of applying the correct findings of facts to the established legal principles. As is clear to us, the paramount issue in this appeal is whether the fourth defendant was an immediate or a subsequent purchaser. The relevance of its fides depends upon that determination. On the evidence, there is no subsequent purchaser in this appeal now before us, and at the risk of being repetitive, the fourth defendant is not a subsequent purchaser.

[110] In light of the evidence obtaining in and relating to this appeal, therefore the learned trial judge was plainly wrong in that regard, as no reasonable judge, similarly circumstanced, would have decided in the manner that he did. As such, on that score, the Court of Appeal was justified in exercising its appellate power to intervene, in order to correct a wrong that had caused substantial injustice to the plaintiffs (see *Gan Yook Chin (P) & Anor v Lee lng Chin @Lee Teck Seng & Ors* [2005] 2 MLJ 1; and *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600] ('*Henderson*'s case')).

[111] We reiterate how the English Supreme Court in the *Henderson* case considered what the 'plainly wrong' test meant, and explained it as follows:

> 62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. *It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.* (Emphasis added.)

[112] As to the questions posed in this appeal by the fourth defendant, we are of the respectful view that this appeal is very much fact-centric. The legal position in play is clear. The appeal is substantially disposed of with the proper application of existing legal principles as decided by the relevant apex court decisions referred to in the preceding paragraphs (see *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51 (FC)).

[113] As was adverted to earlier, the question A involved issue of pleadings and alleged owing of a duty of care by the bank, and in view of our findings and premised on the *Samuel Naik* case it would be unfair to the plaintiffs if such unpleaded issue was considered by this court at this very late stage. Being an immediate purchaser, the fides of the fourth defendant were irrelevant. Its

interest is set aside by the rightful owners of the property, namely the plaintiffs. In the circumstances of this case therefore, we would decline to answer question A. In respect to those questions posed in question B, as the fourth defendant was an immediate purchaser, its interest in the charge, although registered, was defeasible at the instance of the plaintiffs. We therefore answer question B in the affirmative. Finally, in respect of question C, we answer it in the negative, namely the proviso to s 340(3) of the NLC was not available to the bank because it was not a subsequent purchaser of the interest in the property.

[114] Before we conclude, something must be said, in relation to the *Borneo Housing* case in the manner it impacts on these two appeals. It is this. In relation to the first defendant's appeal (Appeal No 22) the plaintiffs had fulfilled the something more requirement that evinced the intention on the part of the first defendant to divest its interest in the property. Having paid the full purchase price, the first defendant was rendered a bare trustee for the plaintiffs. The P2, is a very crucial piece of evidence for the plaintiffs which was not rebutted by the first defendant. It serves the plaintiffs' case in two ways. One, it evinces that full payment of the purchase price had been made by the attorney, to wit, the deceased. Two, it also evinces the intention of the first defendant to divest itself of its interest in the property whereby the terms of that instrument P2 had effectively put the deceased, into its shoes, especially where it authorised the deceased to even transfer the property not only into the deceased's name, but also in the name of any person whom the deceased may nominate. In that sense, the plaintiffs position was definitely considerably stronger than that of the purchaser in the *Borneo Housing* case who did not adduce evidence of such import and significance, apart from showing that it had paid the full purchase price. The purchaser there had therefore failed to show that the vendor had evinced an intention to divest his title in the subject property.

[115] In relation to the fourth defendant's appeal (Appeal No 28), it is this. In the *Borneo Housing* case the bank was a registered subsequent purchaser for value. But the fourth defendant bank in our immediate appeal is an immediate purchaser. Being such, it had no leg to stand on being imperilled or infirmed by the vitiating effects of s 340(2)(b) of the NLC. Without the shield of indefeasibility afforded by the proviso to s 340(3) of the NLC, it being an immediate purchaser, its interest, although registered, was exposed and left unprotected and was defeasible. As such, the fourth defendant here could not elevate itself, to the status of the bank in the *Borneo Housing* case who, on the evidence was properly superior to the purchaser in the *Borneo Housing* case. In this case, the fourth defendant obtained no valid interest in the property at all from the charge it created over the property for the loan facility that it extended to the latter.

[116] With due respect therefore, neither the first defendant, nor the fourth defendant in their respective appeal, could stand to gain from what was decided in the *Borneo Housing* case. The plaintiffs in our immediate appeals are the rightful owners of the property by virtue of P1 and P2, although they are unregistered beneficial owners, and the defeasible interest of the fourth defendant by virtue of s 340(2) of the NLC, stands liable to be set aside, at the plaintiffs' instance as such, as envisaged in the *Tan Ying Hong* case. The case of *Yeong Ah Chee*'s is again respectfully referred to, which had cited the Privy Council in *Oh Hiam*'s case.

CONCLUSION

[117] In conclusion, and in the upshot, we hereby dismiss both appeals by the first defendant (Appeal No 22) and by the fourth defendant (Appeal No 28) with costs. We therefore, affirm the decision of the COA. We hereby so order.

Appeals dismissed with costs.

Reported by Ashok Kumar